MISSISSIPPI LAW JOURNAL

ANOTHER ANOMALY—THE PATIENT'S PRIVILEGE
David C. Welch

ADMINISTRATIVE POLICY TOWARD SECURITY ISSUES UNDER THE PUBLIC UTILITY HOLDING COMPANY ACT
William N. Ethridge, Jr.

THE HEADSTONE OF THE CORNER: THE FEDERAL BILL OF RIGHTS
Walter P. Armstrong

January, 1941

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STATEMENT OF THE OWNERSHIP, MANAGEMENT, CIRCULATION, ETC., REQUIRED BY THE ACTS OF CONGRESS OF AUGUST 24, 1912, AND MARCH 3, 1933.

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State of Mississippi
County of Lafayette } ss.

Before me, a **Notary Public** in and for the State and county aforesaid, personally appeared **J. Louis Alford,** who, having been duly sworn according to law, deposes and says that he is the **Business Manager** of the **Mississippi Law Journal** and that the following is, to the best of his knowledge and belief, a true statement of the ownership, management (and if a daily paper, the circulation), etc., of the aforesaid publication for the date shown in the above caption, required by the Act of August 24, 1912, as amended by the Act of March 3, 1933, embodied in Section 537, Postal Laws and Regulations, printed on the reverse of this form, to wit:

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Sworn to and subscribed to before me this **15th day of January, 1941.**

(Signed) **J. F. Davis, Notary Public.**
(My commission expires **June 8, 1943).**

Mississippi Law Journal

JOURNAL of the MISSISSIPPI STATE BAR

VOL. XIII JANUARY, 1941 No. 2

ANOTHER ANOMALY—THE PATIENT'S PRIVILEGE

*David C. Welch**

It had been raining hard on that fateful night. As the passenger train left Durant and headed toward Winona, the plaintiff and his companions were riding the tender of the locomotive. The rain increased with each mile and the little branch which ran alongside the tracks had become a roaring tide of water. After he had rounded the curve, the engineer applied the emergency brake for he saw that the trestle ahead had washed out. The speed of the train was checked somewhat, but not enough—the engine and the two cars immediately behind it overturned. The plaintiff was caught between the cars. His companions had jumped free.

The inevitable lawsuit followed. At the trial the plaintiff and his friends testified to the effect that the physicians and surgeons called to the scene of the wreck had left the plaintiff to suffer on the cold and wet ground. It was clear to all who were present that if liability was established the damages would certainly be aggravated. To rebut this testimony, the defendant offered to place on the witness stand the doctors who had hastened to that creek bank on their errand of mercy. In the absence of the jury the court was informed that their testimony would establish the fact that when they arrived at the scene of the accident they had found that the plaintiff's injuries had already been treated and that all possible care had been given him and that he had been rushed to the nearby hospital.

Counsel for the plaintiff interposed an objection to the receipt of this evidence on the ground that it would violate the statutory privilege for all confidential communications passing between these physicians and their patient. The objection was sustained. The defendant was left with-

*B.S., 1937, Univ. of Virginia; LL.B., 1940, Harvard; Member of Mississippi and Jones County Bars; Laurel, Mississippi. For his helpful suggestions, his enthusiasm, and his unselfish gift of time and energy, the writer wishes to express his appreciation to Professor J. M. Maguire of the Harvard Law School.

out any means of disproving the story which had been painted by the plaintiff and his companions.[1]

Truly, this presented an anomalous situation. There are many anomalies in the law. One of the most startling of these is the interpretation which courts have given to statutes providing for a privilege for the communications passing between a patient and his physician.

One finds in a study of the development of litigation in the courts that the law has made progress.[2] To be sure, that progress has been slow in many respects. For over three hundred years we have enjoyed an adversary system of litigation designed to produce all of the probative facts. Even so, during a long period of time, a litigant would find that many persons were incompetent to testify in his behalf, *e.g.,* the litigant's wife. On the other hand, a litigant's physician could be called and compelled to testify as to communications passing between himself and his patient. At the common law the physician was not an incompetent witness and there was no privilege as found in the relation of attorney and client or husband and wife.[3]

In time many of these incompetencies were removed by the legislative bodies. In their place, however, sprang many privileges which could be claimed when a witness or litigant was unwilling that certain testimony be presented to the triers of fact. Such exemptions should have been treated as exceptional and as a derogation of the positive duty that every witness should give all of the testimony that he is capable of giving. Professor Wigmore has condemned the expansion of the exceptions as "unwholesome" and feels that they "should be recognized only within the narrowest limits required by principle."[4]

Many distinguished judges and leaders at the bar deplored the fact that there was no privilege for the communications passing between a physician and his patient.[5] It is paradoxical that these men should have let

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[1] *Cf.* the facts in Yazoo & M.V. R.R. v. Messina, 109 Miss. 143, 67 So. 963 (1915), *rev'd on other grounds,* 240 U. S. 395, 60 L. ed. 709, 36 Sup. Ct. 368 (1916), *rehearing,* 111 Miss. 884, 72 So. 779 (1916).

[2] Chafee, *Progress of the Law—Evidence* (1922) 35 HARV. L. REV. 673, 689.

[3] 8 WIGMORE, EVIDENCE (3rd ed. 1940) § 2380; 28 R. C. L. p. 532, § 121; 70 C. J. p. 439, § 588; James, *Privilege for Communications Between Physician and Patient* (1940) 4 U. OF S. C. SELDEN SOC. YEAR BOOK 35. In the case of Killings v. Metropolitan Life Ins. Co., 187 Miss. 265, 273, 192 So. 577, 579 (1940) comparisons are drawn and distinctions made between the relationship here under consideration and the relationships of husband and wife and of attorney and client. The reasons given for the respective privileges in these instances are sufficient to show that the analogy is not a close one.

[4] "Every step beyond these limits helps to provide, without any real necessity, an obstacle to the administration of justice." 8 WIGMORE, EVIDENCE (3rd ed. 1940) § 2192.

[5] 8 WIGMORE, EVIDENCE § 2380; 28 R. C. L. p. 532, § 121.

sentiment and a brotherly feeling for the medical profession rule their better judgment. They must have known that the adoption of such a privilege would inevitably lead to a suppression of the truth.[6] Nevertheless, New York was the first state to establish a statutory privilege to prevent the disclosure of communications which passed between a patient and his physician. In time statutes similar to the one in New York were passed in all but eighteen of the states.[7]

Arguments for this innovation upon the common law might be reduced to their lowest terms: a desire for assured confidence in consulting a medical adviser. No one will seriously question the propriety of the physician or surgeon keeping secret and inviolate the intimate knowledge which comes to him through his patient. There is a popular idea that such information is to be kept *absolutely* secret. This is not the case. The famed Hippocratic Oath is really a promise to abstain from gossip.[8] When called upon in court to divulge such information, the physician is relieved of his duty to his patient due to public necessity requiring that the truth be made known to the jury in order that justice might prevail. The injury resulting from the suppression of the truth is far greater than any injury which could possibly flow from the disclosure of such communications.

The privilege is most often claimed in three situations: (a) actions on insurance policies wherein the truth of the insured's representations as to his health are vital; (b) actions for personal injuries where the amount of injury done to the plaintiff is in issue after liability has been established; and (c) will contest cases where the testamentary capacity of the patient is under inquiry. In each of these instances, and many others, the communications desired in evidence necessarily go to the very issues in contest.

The entire absurdity of the privilege has often been pointed out. It is a truism that, as a matter of fact, the patient's disclosure is not

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[6]"Privilege, the exception of a person or class from the common rule, if not an abuse in its inception, is proverbially sure to become one. The less there is of it under a reign of law the better." Purrington, *An Abused Privilege* (1906) 6 Col. L. Rev. 388; Morgan and Maguire, *Looking Backward and Forward at Evidence* (1937) 50 Harv. L. Rev. 909, 910; note (1928) 12 Minn. L. Rev. 390, 392.

[7]8 Wigmore, Evidence § 2380; Legislation (1933) 81 U. of Pa. L. Rev. 755. The eighteen states without this statutory privilege are: Ala., Conn., Del., Fla., Ga., Ill., La., Me., Md., Mass., N. H., N. J., R. I., S. C., Tenn., Tex., Vt., and Va.

[8]Purrington, *An Abused Privilege* (1906) 6 Col. L. Rev. 388, 395. It is also to be noted that the results of medical examinations and experimentations are reported regularly in the bulletins of the American Medical Association and similar organizations.

induced by the statutory privilege protecting such communications.[9] Knowledge of this statute protecting the "sacred" relationship is learned at the trial. It is folly to attempt here a criticism of the privilege generally when it has been done so admirably by Wigmore:

> "From asthma to broken ribs, from ague to tetanus, the facts of the disease are not only disclosable without shame, but are in fact often publicly known and knowable by everyone—except the appointed investigators of truth."[10]

It is the purpose of this paper to confine the discussion to the Mississippi statute and to the judicial interpretations of it.[11] That statute provides:

> "All communications made to a physician or surgeon by a patient under his charge or by one seeking professional advice, are hereby declared privileged, and such physician or surgeon shall not be required to disclose the same in any legal proceeding, except at the instance of the patient."[12]

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[9]"The manifest reason and obvious purpose of the statute is to enable a patient to disclose his infirmities to his physician in order that the physician may prescribe for his disease without fear that his feelings will be shocked or his reputation tarnished by their disclosure by the physician without his consent." McCaw v. Turner, 126 Miss. 260, 271, 88 So. 705 (1921). But *cf.* Gulf M. & N. R. R. Co. v. Willis, 171 Miss. 732, 739, 157 So. 899, 901 (1934), *sugg. err. overr.*, 171 Miss. 739, 158 So. 551 (1935), wherein it was said: "The purpose of the statute was to protect physicians and surgeons from having to testify as to communications made to them in their professional capacity, and to protect patients from having to disclose statements made to physicians." And see 8 WIGMORE, EVIDENCE § 2380*a*; Emory, *Waiver of Patients' Privilege* (1931) 6 WASH. L. REV. 71, 72; *Developments in the Law—Evidence* (1933) 46 HARV. L. REV. 1138, 1150.

It has been suggested that "In the few instances where honest patients do dread disclosure of their physical condition by the physician, their fear is not that the truth may some day be forced from him in court, but that he may voluntarily spread the facts in conversation. Against this possibility, the law gives almost no protection." Note (1938) 33 ILL. L. REV. 483, 484. In an action by the patient against the doctor for damages arising from a breach of confidence, recovery was denied in Simonsen v. Swenson, 104 Neb. 224, 177 N. W. 831 (1920), noted (1920) 20 COL. L. REV. 890, (1921) 34 HARV. L. REV. 312, (1921) 30 YALE L. J. 289. But see Smith v. Driscoll, 94 Wash. 441, 162 Pac. 572 (1917). *Contra:* A. B. v. C. D., 14 Dunlop 177, 7 Scots Rev. Rep. 800 (1851), noted (1932) 174 L. T. 188.

[10]8 WIGMORE, EVIDENCE §§ 2380*a*, 2285.

[11]Copious citations to authorities in other jurisdictions are to be found in WIGMORE, EVIDENCE (3rd ed. 1940), RULING CASE LAW, and CORPUS JURIS in the appropriate sections. For most of the controversial points, citations are herein given to those cases which have been annotated in the annotated case series.

[12]MISS. CODE ANN. (1930) § 1536. The provision was first found as MISS. CODE ANN. (1906) § 3695 under the title *Physicians*. The original statute has been brought forward without amendment. During the 1940 regular session of the Mississippi Legislature, Messrs. Morrison and Swango introduced a bill, H. B. 588, providing for amendment of the present provision. This bill provides that Section 1536 of the Code of 1930 be amended so as to read as follows: "All communications made to a physician or surgeon by a patient under his charge or by one seeking professional

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It is recognized as the duty of every person to give testimony when called upon. But this statute grants an exception in the guise of a privilege when the relationship of physician and patient is found to exist. There seems to be some conflict among the authorities as to whether or not such statutes are remedial and thus entitled to a liberal construction[13] or whether they are in derogation of the common law and for this reason to receive a strict construction and not to be enlarged by intendment.[14] Though some of its earlier decisions provide room for doubt, the Mississippi Supreme Court has accepted the latter construction.[15]

In the two cases, *New Orleans & N. E. R. R. v. Jackson*[16] and *Metropolitan Life Ins. Co. v. McSwain,*[17] it was held that the statute did not affect the substantive rights and obligations of the parties, but rather was a rule of evidence or adjective law, merely affecting the competency of certain witnesses. Thus, generally, the state statute with respect to the admission of evidence of physicians as construed by the Supreme Court will be controlling and obligatory on the Federal Courts sitting in the state.[18]

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advice, are hereby declared to be privileged, and such physician or surgeon shall not be required to disclose the same, except at the instance of the patient, his personal representatives or his heirs, next of kin or assigns. Provided, however, the provisions of this statute shall not apply in any judicial proceeding wherein the physical or mental condition or cause of death of the patient is an issue to be determined by such proceeding, and provided this section shall not apply in criminal cases." The specific changes will be further noted in the body of this paper. This bill was killed in the House of Representatives, April 2, 1940. It is a start in the right direction, however, and it is to be hoped that some change can be made in the near future.

[13]70 C. J. p. 439, § 588; Legislation (1933) 81 U. of Pa. L. Rev. 755, 756; Note (1928) 12 Minn. L. Rev. 390, 395.

[14]Southwest Metals Co. v. Gomez, 4 F. (2d) 215 (C.C.A. 9th, 1925), 39 A. L. R. 1416, 1421; 28 R. C. L. p. 532, § 121; 8 Wigmore, Evidence § 2192; McCreight, *The Physician and the Evidence Act of* 1907 (1940) 6 U. of Pitt. L. Rev. 59.

[15]Gulf M. & N. R. R. v. Willis, 171 Miss. 732, 739, 157 So. 899, 901 (1934), *sugg. err. overr,* 171 Miss. 739, 158 So. 551 (1935); Goodman v. Lang, 158 Miss. 204, 209, 130 So. 50, 51 (1930). In the *Willis* case the Court said: "The statute must be limited to its language and clear purpose. It has the effect of preventing facts from being disclosed which would often be material to the administration of justice, and it should not be extended by construction." McInnis v. State, 97 Miss. 280, 290, 52 So. 634, 636 (1910); Dibrell v. Dandridge, 51 Miss. 55 (1875); Hopkins v. Sandidge, 31 Miss. 668, 678 (1856); Comment (1930) 2 Mississippi Law Journal 244.

[16]145 Miss. 702, 711, 110 So. 586, 588 (1926).

[17]149 Miss. 455, 459, 115 So. 555, 557 (1927).

[18]Ariz. & N. Mex. R. R. v. Clark, 235 U. S. 669, 59 L. ed. 415, 35 Sup. Ct. 210 (1915); Conn. Mutual Life Ins. Co. v. Union Trust Co., 112 U. S. 250, 28 L. ed. 708, 5 Sup. Ct. 119 (1884). Under Rule 43 of the Rules of Civil Procedure for the District Courts of the United States it is provided: "In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made. The competency of a witness to testify shall be

What effect is to be given to erroneous rulings of the trial judge? If the ruling denies the privilege and compels the witness to testify where in fact the requirements existed for the privilege it has been held to constitute "palpable error."[19] If an improper ruling affirms the privilege where none in fact existed, the party who desired the testimony is entitled to a reversal if the record shows that the testimony desired was relevant and probably would have led to a different verdict by the jury.[20] In the case or *U. S. F. & G. Co. v. Hood*[21] it was said to be error to receive the testimony of the physician even in the absence of the jury. This statement was based on the idea that the judge and members of the bar were no more entitled to hear the privileged communication than were the members of the jury. This seems to be clearly wrong, as it may be necessary to admit such confidential communications as a preliminary matter and in the absence of the jury, in order to determine if the relationship in fact existed. If the relationship did not exist, of course the evidence should be presented.[22]

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determined in like manner." It would seem that many more cases will now be transferred to the federal courts. For a very able discussion of this problem see Callahan and Ferguson, *Evidence and the New Federal Rules of Civil Procedure* (1936) 45 YALE L. J. 622, 47 *id.* 194, 207. Even if it had been held that the statute affected the substantive rights of the parties, under the rule of Erie R. R. v. Tompkins, 304 U. S. 64, 82 L. ed. 1189, 58 Sup. Ct. 817 (1938), the state law would have governed. It was there held that there was no federal general common law. For interesting problems arising from the overruling of Swift v. Tyson, 16 Pet. 1 (U. S. 1842), see: Miller, *Swift v. Tyson and Some Considerations of Philosophy in American Law* (1939) 11 MISSISSIPPI LAW JOURNAL 243; Shulman, *The Demise of Swift v. Tyson* (1938) 47 YALE L. J. 1336; Note (1938) 38 COL. L. REV. 1472.

[19]Hamel v. So. R. R. Co., 115 Miss. 344, 356, 74 So. 276, 277 (1917). Though it was not necessary to the decision, it was said in Vance v. State, 182 Miss. 840, 861, 183 So. 280, 284 (1938), ". . . we conclude that even if it was error for the court to have admitted the testimony of the physician over the objection of Miss Vance [the defendant's daughter], in a legal sense that cannot operate in favor of the accused, and he cannot complain thereasto." The doctor called was Miss Vance's physician. See, McCormick, *The Scope of Privilege in the Law of Evidence* (1938) 16 TEX. L. REV. 447, 449.

[20]Metropolitan Life Ins. Co. v. Evans, 183 Miss. 859, 870, 184 So. 426, 427 (1938), discussed by Taintor, *Work of the Mississippi Supreme Court—Evidence* (1939) 12 MISSISSIPPI LAW JOURNAL 61; Gulf M. & N. R. R. v. Willis, 171 Miss. 732, 739, 157 So. 899, 901 (1934), *sugg. err. overr.*, 171 Miss. 739, 158 So. 551 (1935); 8 WIGMORE, EVIDENCE § 2192. In the *Willis* case the Supreme Court refused to reverse for rejection of non-privileged evidence on the ground that there was no showing in the record of a sufficient offer of proof.

[21]On suggestion of error, 124 Miss. 548, 571, 87 So. 115, 119, 15 A. L. R. 605 (1920). For previous memorandum decision, see 86 So. 814 (1920).

[22]Sproles v. State, 176 Miss. 810, 170 So. 293 (1936), where a physician was allowed to testify that he had not treated the defendant for a lick on the head, but that he had treated him for malaria. The statement in the *Hood* case, *supra* note 21, was not necessary to the decision of the case because the plaintiff-patient had recovered in the lower court, and the question before the Supreme Court was the defendant's assignment of error that the testimony should not have been excluded from the jury. The attitude of the Court in the *Hood* case seems to have been overruled *sub silentio* in the subsequent cases; see, *e.g.*, Provident Life & Acc. Ins. Co. v. Chapman, 152 Miss. 747, 118 So. 437 (1928).

Are unfavorable inferences to arise from a party's failure to produce, or refusal to consent to the admission of testimony of a witness to a privileged communication between himself and such party? It is the opinion of Professor Wigmore that when a party fails to call such a witness in his own behalf the unfavorable inference may be made. Further, he is of the opinion that no inference should be indulged where the party claims the privilege when the opponent calls the witness to the stand.[23] The distinction seems to be a sound one.

Until very recently, this problem was not clearly decided in Mississippi.[24] In *Killings v. Metropolitan Life Ins. Co.*,[25] the plaintiff sought to recover on a group insurance policy providing for benefits in the event the insured was "permanently, continuously and wholly prevented from pursuing any and all gainful occupation." The issue of disability was in conflict, but the jury found for the defendant on this point. During the period of illness leading up to the alleged disability, the insured was treated by Dr. Waldrup and Dr. Barnes. And for the purpose of this suit the plaintiff procured an examination by Dr. Butler.[26] Drs. Butler and

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[23]8 WIGMORE, EVIDENCE § 2386. In the case of Sumpter v. Natl. Grocery Co., 194 Wash. 598, 78 P. (2d) 1087, 116 A. L. R. 1166, 1170 (1938) it was held to be reversible error to permit the opposing attorney to comment on the other party's refusal to permit introduction of, or to offer, privileged testimony, or to permit privileged witness to testify. The annotator notes that in some jurisdictions it is held that it is improper to allow such comment, but that it is not so prejudicial as to call for a reversal on that ground alone.

[24]In the case of Johnson v. State, 63 Miss. 313, 316 (1885), it was decided that when the defendant's wife was not called to testify in her husband's behalf, that fact "was not a legitimate subject of discussion by counsel, or of consideration by the jury." Reasoning from this relationship of husband and wife and the privilege flowing therefrom, the Court held in the case of Hobson v. McLeod, 165 Miss. 853, 147 So. 778 (1933), that it was error for the court to grant an instruction to the effect that the jury was to draw no unfavorable inference from the fact that the defendant had not called plaintiff's physician as a witness—the witness being unqualified under the statute. It was there suggested that to grant such an instruction would lead the jury to infer unfavorably against the plaintiff for not calling his physician when available. (As to the propriety of the analogy between the husband-wife relationship and that of the physician and his patient, see note 3 *supra*.) Following the *Hobson* case came two decisions which tended to repudiate the doctrine therein announced: Beard v. Williams, 172 Miss. 880, 161 So. 750 (1935), and Robinson v. Haydel, 177 Miss. 233, 247, 171 So. 7, 9 (1936). In the latter case it was said through Justice Anderson: "The rule is that the failure of a party to produce a witness, which he can do and his adversary cannot, who knows the facts, if anyone does, raises the presumption that such facts do not exist." See, McCormick, *The Scope of Privilege in the Law of Evidence* (1938) 16 TEX. L. REV. 447, 466.

[25]187 Miss. 265, 192 So. 577 (1940).

[26]In Basil v. Ford Motor Co., 278 Mich. 173, 270 N. W. 258, 107 A. L. R. 1491, 1495 (1936), the contention was made that the privileged relationship could not exist when the purpose of the visit to the physician was for an examination and not for treatment. This contention was denied. From the cases there collated it is to be noted that the general rule is contrary to that position, *e.g.*, see, Dixie Greyhound Lines Inc. v. Matthews, 177 Miss. 103, 170 So. 686, 108 A. L. R. 134 (1936).

Barnes testified to the effect that the plaintiff was disabled.[27] The insured did not call Dr. Waldrup, although he was available and accessible. Counsel for the defendant insurance company secured an instruction to the effect that they could not call Dr. Waldrup under the provisions of the Code as the required relationship of patient and physician existed.[28] This further instruction was granted for the defendant:

> "The Court instructs the jury for the defendant that the fact that the plaintiff has not introduced as a witness Dr. N. W. Waldrup, will justify the jury in inferring that had Dr. Waldrup been introduced his testimony would have been unfavorable to the plaintiff."[29]

The granting of this instruction was assigned as error. However, the Court affirmed a verdict and judgment thereon in favor of the defendant, a majority of the Court being of the opinion that there was no error in the granting of the above instruction.[30]

In many of the states there is an express exception of criminal cases from the privileged communications statute.[31] In Mississippi there has been some confusion as to whether or not the privileged communication statute applies in a criminal proceeding. Where there is no express exception, the view more commonly accepted by the courts is that the privi-

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[27]On cross examination it was found that Dr. Butler had been employed to testify in plaintiff's behalf as he had similarly been employed by and testified for co-employees of this plaintiff in similar litigation. As for Dr. Barnes (colored), he admitted that he was a narcotic criminal convict.

[28]If the proposed amendment to Section 1536 of the Code of 1930, quoted in full in note 12 *supra*, had been enacted, the problem in the principal case would not arise and the plaintiff would not be allowed to claim the privilege, because of the fact that the statute would be inapplicable in suits "wherein the physical or mental condition or cause of death of the patient is an issue to be determined by such proceeding."

[29]187 Miss. 265, 279, 192 So. 577, 581 (1940).

[30]The dissenting opinion of Justice McGowen is understandable due to the fact that he was the author of the opinion in Hobson v. McLeod, 165 Miss. 853, 147 So. 778 (1933), *supra* note 24. In his opinion there is no reference to the subsequent cases of Robinson v. Haydel, 177 Miss. 233, 171 So. 7 (1936), and Beard v. Williams, 172 Miss. 880, 161 So. 750 (1935). The qualification suggested in the specially concurring opinion of Justice Ethridge would work an undue hardship on many corporations and other businesses where in fact the "company doctor" is the physician of the employee, or the insurance examiner is the regular physician for the applicant for insurance, etc. No Mississippi cases were found dealing with the problem of counsel commenting on the patient's claim of privilege.

[31]*E.g.*, see: ALASKA COMP. LAWS (1933) § 4312; CAL. CODE CIV. PROC. (Deering, 1939) § 1881; D. C. CODE (1929) tit. 9, § 20; HAWAII REV. LAWS (1935) § 3829; IDAHO CODE ANN. (1932) § 16-203; MONT. REV. CODES ANN. (Anderson & McFarland, 1935) § 10536; PA. STAT. (Purdon, 1936) tit. 28, § 328; S. D. CODE (1939) § 36.0101; UTAH REV. STAT. ANN. (1933) tit. 104, c. 49-3; and WASH. REV. STAT. ANN. (Remington, 1931) § 1214. The proposed amendment to the Mississippi Code of 1930, quoted *supra* note 12, would likewise exempt criminal proceedings from the privilege.

lege applies in criminal as well as in civil cases unless the communications are made for an unlawful purpose having as their object the commission of a crime, *e.g.*, communications passed during an operation and treatment following an illegal abortion.[32] In the first Mississippi case to involve this point[33] the members of the Court were in conflict. Four of the judges announced their opinion that the statute did apply to criminal cases, and two of the judges were of the opinion that the statute had no application to criminal proceedings. One of the judges aligning himself with the former group did not think that a defendant could raise the question of privilege. Subsequently, in the case of *Maddox v. State*[34] it was held to be no reversible error to admit over the objection of the defendant the testimony of the physician who attended the deceased with reference to the condition of the wound. Justice Anderson in the case of *Keeton v. State*[35] registered anew his condemnation of former rulings applying the privileged communications statute to criminal cases. Thus, in view of persistent dissent, it cannot be said with any assurance that the law in Mississippi on this point is settled definitely. It is to be hoped, however, that with an amendment of our statute the suggested provision expressly exempting criminal proceedings from the operation of the statute will be accepted.

By a considerable body of authority it has been held that the statute applies to probate proceedings as well as to civil actions.[36] In many other

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[32]Wis. Stat. (1937) § 325.26; 28 R. C. L. p. 533, § 122; 8 Wigmore, Evidence § 2385. Note will later be made of cases involving malpractice suits against physicians. See *infra* note 106.

[33]Davenport v. State, 143 Miss. 121, 108 So. 433, 45 A. L. R. 1348, 1357 (1926). The annotator expressed the view that the rule of privilege did not apply in criminal cases and that any other result would operate as a shield to a person accused of a crime. It was there said: ". . . consequently, the great weight of authority supports the view that the defendant in a criminal prosecution has no right to object to the testimony of a physician with respect to the victim of the crime, on the ground of privileged communication." Note (1926) 45 A. L. R. 1348, 1357. Note the distinction in this view and that expressed in the body of the paper above.

[34]173 Miss. 799, 163 So. 449 (1935).

[35]175 Miss. 631, 649, 167 So. 68, 71 (1935), wherein Justice Anderson said: "The decisions of our court to the contrary, the writer thinks, ought to be overruled." Indeed, such a result might well be reached with a change in the personnel of the Court.

[36]Watkins v. Watkins, 142 Miss. 210, 106 So. 753 (1925); Dabbs v. Richardson, 137 Miss. 789, 102 So. 769 (1924); Estes v. McGehee, 133 Miss. 174, 97 So. 530 (1923); Hunter v. Hunter, 127 Miss. 683, 90 So. 440 (1921); McCaw v. Turner, 126 Miss. 260, 271, 88 So. 705 (1921). And *see:* Auld v. Cathro, 20 N. D. 461, 128 N. W. 1025, 32 L. R. A. (n.s.) 71, 72 (1910); 28 R. C. L. p. 541, § 131.

states a different result is often reached either by statute or by statutory construction.[37]

In the case of *Hunter v. Hunter*[38] counsel defending a will contest made an ingenious argument. It was there contended that the privileged communications statute had been repealed by implication by the statute creating a bureau of vital statistics and providing that the records so formulated were to be accepted in evidence as *prima facie* proof and as an exception to the rule against hearsay.[39] However, the Court rejected the argument and held that the latter statute was not involved. In a subsequent case,[40] the argument was put a little more forcefully. There, in a suit on a life insurance policy, the defendant offered in evidence the properly certified copies from the records of the bureau of vital statistics showing the required facts with reference to the death of the insured and the delivery of a stillborn baby. It was held that since the statute making such records *prima facie* evidence had been passed subsequent to the statute giving the privilege to communications between the physician and his patient, it must have been the intention of the Legislature to except such records from the operation of the privileged communications statute. This seems to be a laudable decision. There was no longer any reason for privacy due to the requirement of law. In other words, the public interest in the records had to prevail over any desire for secrecy as to one's ailments.[41] Apparently there has been a similar relaxation in regard to

[37] *E.g.*, CAL. CODE DIV. PROC. (Deering, 1939) § 1881 (not applicable in will contests); HAWAII REV. LAWS (1935) § 3829 (not applicable where the sanity of the patient is in controversy); MICH. STAT. ANN. (1935) § 27.911 (will contests excepted); UTAH REV. STAT. ANN. (1933) tit. 104, c. 49.3 [not applicable in will contests by construction; Miller v. Livingston, 31 Utah 415, 88 Pac. 338 (1906)]; WIS. STAT. (1937) § 325.21 (excepts lunacy hearings). The proposed amendment to the Mississippi statute, *supra* note 12, would exempt those cases wherein the mental capacity of the testator is in issue. The cases dealing with the problem of who should be allowed to waive the statute in probate proceedings will be considered later. See *infra* page 161.

[38] 127 Miss. 683, 90 So. 440 (1921).

[39] MISS. CODE ANN. (1930) § 4908 provides: "Any copy of the records of birth, sickness or death, when properly certified to by the state registrar of vital statistics, to be a true copy thereof, shall be prima facie in all courts and places of the facts therein stated." This is the well known public-document exception to the hearsay rule. See in addition: Branford Trust Co. v. Prudential Ins. Co., 102 Conn. 481, 129 Atl. 379, 42 A. L. R. 1450, 1454 (1925); Galli v. Wells, 209 Mo. App. 467, 239 S. W. 984 (1922); Bozicevich v. Kenilworth Mercantile Co., 58 Utah 458, 199 Pac. 406, 17 A. L. R. 346, 359 (1921); 8 WIGMORE, EVIDENCE § 2385*a*.

[40] Life & Cas. Ins. Co. v. Walters, 180 Miss. 384, 177 So. 47 (1937).

[41] 8 WIGMORE, EVIDENCE § 2385*a*. There are similar exceptions in those jurisdictions with Workmen's Compensation Acts and the like; *e.g.*, IOWA CODE (1939) § 1461; NEV. COMP. LAWS (Hillyer, 1929) § 2714. During the regular 1940 session of the Mississippi Legislature a bill was introduced, S. B. 288, providing for workmen's compensation. The bill failed to pass. If any bill is passed in the future, it is hoped that the measure will carry an express exception of the privileged-communications statute. Nearly all of the modern industrial accident legislation has repudiated the privilege in that class of injuries. In addition, see: ALA. CODE ANN. (1923) § 7567; WIS. STAT. (1937) § 102.13.

some hospital records.[42]

There are other situations in which the statute does not operate.[43] *Metropolitan Life Ins. Co. v. Evans*[44] was an action on a total disability clause of an industrial group policy issued by the defendant company. Plaintiff's physician testified to the effect that his patient was totally and permanently disabled with an "enlarged heart and prostatic enlargement and hypertension."[45] The plaintiff had presented himself voluntarily to the defendant's medical examiner in order to establish his claim. That examination revealed that there was really nothing seriously wrong with the plaintiff, but the evidence to that effect was excluded on the ground of privilege. In reversing and holding that the defendant's medical examiner was competent, the Court said:

> ". . . this privileged communications statute has no application, for the appellee was not a patient of this physician and was not seeking professional advice from him, but, on the contrary, was submitting himself to an examination by the physician for

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[42]Compare Metropolitan Life Ins. Co. v. McSwain, 149 Miss. 455, 115 So. 555 (1927), with Motley v. State, 174 Miss. 568, 165 So. 296 (1936). In the former case the plaintiff had represented that he had not received hospital treatment during the previous five years and that he had not been afflicted with consumption. In rebuttal, the defendant company desired to introduce the records of an Illinois hospital and statements of an attending physician that plaintiff had been treated for consumption of the spine and joints. The offer of proof was rejected. In the latter case, the law required a record to be kept of insane patients. On principle in would seem that a different result might have been reached in the *McSwain* case had it been made to appear that the Illinois statute required all hospitals to keep such records of its patients. However, in Smart v. Kansas City, 208 Mo. 162, 105 S. W. 709, 14 L. R. A. (N.S.) 565 (1907), this suggestion was refuted by the claim that the records were required to be kept for the benefit of the institution and not for that of outside litigants. As generally touching the problems raised over the admissibility of hospital charts and records, see Lund v. Olson, 182 Minn. 204, 234 N. W. 310, 75 A. L. R. 371, 378 (1931). As a general rule the records of an insane asylum are held not to be within the professional relation contemplated by the privileged-communications statute. See, Mass. Mutual Life Ins. Co. v. Board of Trustees, 178 Mich. 193, 144 N. W. 538, 51 L. R. A. (N.S.) 22 (1913).

[43]Generally the presence of a third person destroys the confidential character of the communications between a physician and his patient. It is usually held that the third person may testify to the communications but that the physician cannot. In addition, the third person must not have been an assistant to the physician; see *infra* page 152. See, Leeds v. Prudential Ins. Co. of Am., 128 Neb. 395, 258 N. W. 672, 96 A. L. R. 1414, 1419 (1935), Comment (1937) 16 NEB. L. BULL. 206. Family matters or affairs learned by the physician while professionally attending the patient are usually not within the statutory privilege. See Myers v. State, 192 Ind. 592, 137 N. E. 547, 24 A. L. R. 1196, 1202 (1922). As a general rule the privilege is not extended to facts learned on an autopsy or post-mortem examination, as in Travelers' Ins. Co. v. Bergenson, 25 F. (2d) 680 (C. C. A. 8th, 1928), 58 A. L. R. 1127, 1134 (1929).

[44]183 Miss. 859, 184 So. 426 (1938), discussed in Taintor, *Work of the Mississippi Supreme Court—Evidence* (1939) 12 MISSISSIPPI LAW JOURNAL 61.

[45]183 Miss. 859, 869, 184 So. 426, 427 (1938).

the purpose of enabling him to report on the facts he might thereby find to the appellant."[46]

Also, where the physician can segregate the information which he has gained by social intercourse with his patient from that gained in his professional capacity, he may be offered as a non-expert as to these matters and it is not error to permit him to testify.[47] It is for the trial judge to determine if the physician can segregate the two types of information.[48]

In order for a physician to be incompetent, the relation of physician and patient must have existed between him and the person as to whose statements, symptoms, or conditions he is called to testify at the time he acquired the information which he is called on to disclose. Of course, it is not necessary that the physician actually treat the patient,[49] nor that he should receive a fee,[50] since neither is necessary to the existence of the confidential relation and disclosures in reliance upon it. The statute goes to *all* communications; and is not confined, as it is in many states,[51] to those communications which might be *necessary* to enable the physician to treat or prescribe for the patient.[52]

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[46]*Id.* at 870, 184 So. at 427. *Cf.* Dixie Greyhound Lines, Inc. v. Matthews, 177 Miss. 103, 113, 170 So. 686, 688, 108 A. L. R. 134 (1936), and Davis v. Elzey, 126 Miss. 789, 88 So. 630 (1921), *sugg. err. overr.* (except as to damages), 126 Miss. 811, 89 So. 666 (1921). See also, 70 C. J. p. 443, § 597; 28 R. C. L. p. 539, § 129; *Developments in the Law—Evidence* (1933) 46 HARV. L. REV. 1138.

[47]Estes v. McGehee, 133 Miss. 174, 97 So. 530 (1923).

[48]Watkins v. Watkins, 142 Miss. 210, 240, 106 So. 753, 758 (1925); Dabbs v. Richardson, 137 Miss. 789, 102 So. 769 (1924). In the *Dabbs* case it was held that the physician could testify as an expert in answer to hypothetical questions based upon the testimony of lay witnesses. *Cf.* suggestion in Taintor, *Work of the Mississippi Supreme Court—Evidence* (1939) 12 MISSISSIPPI LAW JOURNAL 61, 62.

[49]MISS. CODE ANN. (1930) § 1536. It is sufficient if the patient is merely seeking professional advice.

[50]McGuire v. Chicago & A. R. R., 178 S. W. 79, L. R. A. 1915F 888 (Mo. 1915).

[51]*E.g.*, ARK. DIG. STAT. (Pope, 1937) § 5159; COLO. COMP. STAT. (1935) c. 177, § 9; MONT. REV. CODES ANN. (Anderson & McFarland, 1935) § 10536; NEV. COMP. LAWS (Hillyer, 1929) § 8874; ORE. CODE ANN. (1930) § 9-404; WIS. STAT. (1937) § 325.21; W. VA. CODE ANN. (Michie & Sublett, 1937) § 4992.

[52]28 R. C. L. p. 536, §§ 126, 127; Purrington, *An Abused Privilege* (1906) 6 COL. L. REV. 388, 414; Note (1928) 12 MINN. L. REV. 390, 396.

II

The burden is upon the one claiming the privilege to show that the conditions exist which entitle him to insist upon the exclusion of the proposed testimony. Thus, when it is sought to exclude testimony on the ground that it is privileged, the litigant so claiming much show (a) that a communication has been made, (b) to a physician or surgeon, and (c) by a patient or one seeking professional services or advice.[53]

The first case in the state passing on the statute which granted the privilege was *Yazoo & M. V. R. R. v. Messina.*[54] As this case was cited as controlling on many points in subsequent cases,[55] it might be well to determine the exact holding of the Court.[56] It is to be regretted that the real issues were not presented to the Court. On appeal the defendant contended only that the testimony should not have been excluded, his contention being that there was no communication between physician and patient because the testimony sought to be introduced had been learned from a mere inspection of the plaintiff's injuries.[57] In holding that the information so acquired was a "communication" within the statute, the Court said:

> "His knowledge of the matter inquired about came to him from his examination of his patient. It is not necessary that the communication should be made by words in order to be privileged. There is no more sacred relation of confidence than the relationship of physician and patient, and it was, in our opinion, the intention of the legislature to close the lips of the physician concerning any and everything he knows about the patient by oral examination or from physical examination of his patient."[58]

As far as the case deals with the communication point—and that was the only question squarely presented to the court—it seems that the Court was entirely correct. But, did the relationship of physician and

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[53]Miss. Code Ann. (1930) § 1536; Keeton v. State, 175 Miss. 631, 651, 167 So. 68, 72 (1936); 8 Wigmore, Evidence § 2381.

[54]109 Miss. 143, 67 So. 963 (1915), *rev'd on other grounds,* 240 U. S. 395, 60 L. ed. 709, 36 Sup. Ct. 368 (1916), *rehearing,* 111 Miss. 884, 72 So. 779 (1916).

[55]*E.g.* Newton Oil Mill v. Spencer, 116 Miss. 568, 573, 77 So. 605, 606 (1917) cites the principal case as settling the proposition that there was no implied waiver under certain circumstances. See *infra* note 111. The question of waiver in the *Messina* case was mentioned only in the dissenting opinion in the second appeal of the case.

[56]For the facts in the case, see *supra* page 137.

[57]It is suggested that the argument of counsel should have been: (a) the relationship of physician and patient did not exist; and (b) even if the relationship did exist, this was not the type communication which the Legislature intended to protect. It is further suggested that there can be no "sacred relation" without a desire to enter into it.

[58]109 Miss. 143, 150, 67 So. 963, 965 (1915).

patient exist within the contemplation of the statute? There was certainly no confidence in the "sacred relation" between the railroad doctor and this plaintiff. The reason for giving a privilege to the communications between a physician and his patient has already been suggested.[59] How can it seriously be contended that to deny the privilege in this instance would discourage persons from seeking adequate medical treatment?[60]

It often happens that the alleged communication touches a matter as to which a layman could testify quite as well as could the physician or surgeon. Such might very well be the case when it is material to determine if one of the parties was under the influence of intoxicating liquor at the time of an accident. Should the fact that it might be equally as well known to a layman as to a physician make the latter's testimony in regard thereto competent? It has been suggested that there is a conflict of authority on the point, with a tendency by a majority of the courts to hold that even under such circumstances the physician is incompetent.[61] Mississippi has certainly accepted this view.[62] This shows but one of the many absurd results which have been reached under the statute.

In a very interesting case[63] there was an attempt by the defendant to introduce X-ray pictures made under the direction of the doctor who had attended plaintiff immediately after the accident in controversy. Plaintiff's objection was sustained and it was held that:

> ". . . the X-Ray picture was incompetent because made for the use of the physicians, and was a part of the information acquired by the physicians in attending the patient."[64]

A somewhat analogous case is *Dixie Greyhound Lines Inc. v. Matthews*.[65] In that case the plaintiff's physician had X-ray pictures made in conjunction with another doctor. In rebuttal, after the X-rays had been introduced in evidence by the plaintiff, three radiologists were offered by the defendant; and they testified to the effect that the pictures were so poorly made as to be of no value due to the fact that they were taken

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[59]See note 9 *supra*.

[60]See: Woods v. Town of Lisbon, 138 Iowa 402, 116 N. W. 143, 16 L. R. A. (N.S.) 886 (1908); Bassil v. Ford Motor Co., 278 Mich. 173, 270 N. W. 258, 107 A. L. R. 1491, 1495 (1936); McGuire v. Chicago & A. R. R., 178 S. W. 79, L. R. A. 1915F 888 (Mo. 1915); Epstein v. Pa. R. R., 250 Mo. 1, 156 S. W. 699, 48 L. R. A. (N.S.) 394, 395 (1913).

[61]28 R. C. L. p. 535, § 125.

[62]Goodman v. Lang, 158 Miss. 204, 130 So. 50 (1930); Yazoo & M. V. R. R. v. Decker, 150 Miss. 621, 116 So. 287 (1928); Perry v. Hannagan, 257 Mich. 120, 241 N. W. 232, 79 A. L. R. 1127, 1131 (1932).

[63]Tonkel v. Yazoo & M. V. R. R., 170 Miss. 321, 154 So. 351 (1934).

[64]Ethridge, J., at 170 Miss. 321, 329, 154 So. 351, 353 (1934).

[65]177 Miss. 103, 170 So. 686, 108 A. L. R. 134, 142 (1936).

at an "off" angle, and that the plaintiff had suffered no serious injury. As to the doctrine of the inviolability of the person,[66] the Court held that by an exhibition of the injured parts to the jury there was a waiver of the privilege. Justice Ethridge, dissenting, was of the opinion that, though the privileged communications statute was not directly involved, the principles enunciated under that statute had been violated by the majority opinion. It was his contention that, if there was a waiver of the inviolability privilege, it went only to the surface of the skin and did not extend to an X-ray of that portion of the body lying beneath the skin.[67]

Once the relationship has been established, it makes no difference as to the mode in which the information is acquired; and it may be either by direct communication or by observation or examination.[68] All that is then required is that it be acquired while in professional attendance on the patient. The privilege includes the statements or communications from the physician to the patient as well as those from the patient to the physician. If any other result were reached it would be possible to do indirectly that which could not be done directly.[69]

Who are physicians and surgeons under the statute?[70] Though there are no Mississippi cases squarely on the point, it is suggested that the statute should be so construed as to include physicians and surgeons authorized to practice in this or any other state.[71] From the standpoint of the cases it would be best to consider what classes or groups of persons have been adjudged without the privilege. In *Gulf M. & N. R. R. v. Willis*[72] it was held that a dentist was without the statutory limitation, and this seems to be in accord with the generally accepted rule.[73] The same conclus-

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[66]In the above annotation, *supra* note 65, many cases are noted in regard to the power of a defendant to require the plantiff to submit to a physical examination. There is a split of authority on the point. It should be left to the trial court's discretion. See, HAWAII REV. LAWS (1935) § 3862.

[67]177 Miss. 103, 120, 170 So. 686, 692, 108 A. L. R. 134 (1936). This seems to be a clear case of the proverbial *reductio ab absurdum.*

[68]See the discussion of the *Messina* case *supra* pages 149, 150, and particularly note 60.

[69]28 R. C. L. p. 535, §§ 124, 125; 8 WIGMORE, EVIDENCE § 2384.

[70]In many states the statute requires that the physician or surgeon be "authorized" or "licensed" to practice, *e.g.:* ARK. DIG. STAT. (Pope, 1937) § 5159; CAL. CODE CIV. PROC. (Deering, 1939) § 1881; MINN. STAT. (Mason, 1927) § 9814; N. M. STAT. ANN. (Courtright, 1929) § 45-512; N. C. CODE ANN. (1939) § 1798; PA. STAT. (Purdon, 1936) tit. 28, § 328.

[71]This would certainly be in line with the expressed legislative intention in many other states. This would certainly be more satisfactory than the mere requirement that the physician be a "regular" one. See: WASH. REV. STAT. ANN. (Remington, 1931) § 1214; Purrington, *An Abused Privilege* (1906) 6 COL. L. REV. 388, 414.

[72]171 Miss. 732, 157 So. 899, 901 (1934), *sugg. err. overr.,* 171 Miss. 739, 158 So. 551 (1935); 8 WIGMORE, EVIDENCE § 2382.

[73]28 R. C. L. p. 538, § 128.

ion was reached as to chiropractors.[74] Generally the privilege also extends to physicians connected with a hospital, internes, and hospital attendants who offer testimony as to the condition of a patient therein, if their duties in the hospital involved professional attendance to that patient.[75]

The privilege is extended to the attending physician's partner who visits the other's patient, and it has been said by the Court:

> "Where two physicians are partners, patients are patients of the firm, and are entitled to advice and attention, and to have the privilege accorded by the statute applicable to both of them."[76]

It has also been held that the privilege extends to those doctors who may be called in by the attending physician, *e.g.,* a specialist, as in the case of *Provident Life & Accident Ins. Co. v. Chapman.*[77]

The provisions of the statute do not cover those instances where there are communications to nurses.[78] However, in one case the Supreme Court refused to reverse even though a nurse's testimony had been ruled privileged in the lower court.[79] Of course, nurses must testify as non-experts. A nurse is a qualified witness when she is not the attending physician's employee or assistant.[80] But communications to a nurse may be privileged when she gains such information by being present and assisting a physician,

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[74]Kress Co. v. Sharp, 156 Miss. 693, 126 So. 650, 68 A. L. R. 167, 176 (1930).

[75]Frederick v. Fed. Life Ins. Co., 13 Calif. App. (2d) 585, 57 P. (2d) 235 (1936); Chicago, L. S. & S. B. Ry. v. Walas, 192 Ind. 369, 135 N. E. 150, 22 A. L. R. 1212, 1217 (1922).

[76]Miss. P. & L. Co. v. Jordan, 64 Miss. 174, 184, 143 So. 483, 485 (1932).

[77]152 Miss. 747, 758, 118 So. 437, 439 (1928). The Court was of the opinion that there was no error in the exclusion of the testimony of the specialist. It was there said: "We think the policy of the statute would be best promoted by leaving the physician free to secure additional medical opinion for the benefit of the patient, and that his act would be attributed to the patient in inviting other medical aid for consultation. . . [or otherwise] it would be possible to defeat the purpose of the statute by the simple expedient of a doctor inviting others of his profession to examine a patient out of mere consideration of curiosity." See also, McGuire v. Chicago & A. R. R., 178 S. W. 79, L. R. A. 1915F 888, 891 (Mo. 1915); 28 R. C. L. p. 540, § 130.

[78]Miss. Code Ann. (1930) § 1536. By express provision nurses are included in the statute in some few jurisdictions. See: Ark. Dig. Stat. (Pope, 1937) § 5159; N. M Stat. Ann. (Courtright, 1929) § 45-512; N. Y. C. P. A. (1920) § 352. If it is felt that the statutory privilege is necessary at all events, it would seem wise to include nurses, assistants, etc. within its provision.

[79]Goodman v. Lang, 158 Miss. 204, 150 So. 50 (1930).

[80]Life & Cas. Ins. Co. v. Walters, 180 Miss. 384, 392, 177 So. 47, 49 (1937). To the same effect is S. W. Metal Co. v. Gomez, 4 F. (2d) 215 (C. C. A. 9th, 1925), 39 A. L. R. 1416, 1421 (1925), wherein it is suggested that any change from the express provisions of the statute should be made by the legislature and not by the courts.

and in such capacity overhears communications passing between the physician and his patient.[81]

Does the relationship of physician and patient exist when officers of the law or the court direct that an examination of the accused be made?[82] There are several interesting decisions on this point.[83] In the first of these, *Norwood v. State*,[84] the defendant was charged with a statutory crime, the details of which were so heinous that the Court would not divulge them in their statement of the facts. When questioned by the officers, Norwood voluntarily submitted to an examination by a physician called by the sheriff. Damaging evidence was found in the way of blood stains on the accused's underclothes. Thus, the problem before the Court was whether or not the relationship existed under such circumstances. It was the purpose of the prosecution to introduce the physician in the State's behalf. The Court pointed out that there was a general division of judicial opinion on the subject, but that they would take the position that "whenever the circumstances are such that the relation can reasonably and consistently be held to exist, that view of the case will be taken."[85] However, the facts of the case presented a particularly atrocious crime and forced the Court to a happier result, for it was held that the objection of the defendant to the introduction of this damaging evidence was without avail.[86]

In *Keeton v State*[87] the matter under immediate consideration was gone into rather thoroughly in the majority opinion as well as in the two

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[81]Miss. P. & L. Co. v. Jordan, 164 Miss. 174, 185, 143 So. 483, 485 (1932). In addition see: Myers v. State, 192 Ind. 592, 137 N. E. 547, 24 A. L. R. 1196, 1202 (1922); Leeds v. Prudential Ins. Co. of America, 128 Neb. 395, 258 N. W. 672, 96 A. L. R. 1414, 1419 (1935); 8 WIGMORE, EVIDENCE §§ 2381, 2382.

[82]McGuire v. Chicago & A. R. R. Co., 178 S. W. 79, L. R. A. 1915F 888, 892, (Mo. 1915).

[83]Keeton v. State, 175 Miss. 631, 167 So. 68 (1936); Motley v. State, 174 Miss. 568, 165 So. 296 (1936); Norwood v. State, 158 Miss. 550, 130 So. 733 (1930).

[84]158 Miss. 550, 130 So. 733 (1930).

[85]158 Miss. 550, 553, 130 So. 733 (1930). It was further said: "Where a person is examined by a physician at the instance or with the approval of the officers of the law enforcement, and when the person so examined then and there knows, or the facts are such as to reasonably give knowledge that the examination is solely for the purpose aforesaid, and no illegal or otherwise wrongful means are used to secure the examination or inspection, the statute is not available." *Cf.* the quotation in the text with *Developments in the Law—Evidence* (1933) 46 HARV. L. REV. 1138, 1148, wherein it is suggested: "It may be significant that in close cases involving privilege and competency of witnesses the courts have almost always been able to hold the questioned testimony admissible."

[86]Assuming that the statute applies to criminal as well as to civil cases (see *supra* pp. 144, 145), it is hard to square the result here reached with that in Yazoo & M. V. R. R. v. Messina, 109 Miss. 143, 67 So. 963 (1915), discussed *supra* pages 149, 150. It is in accord with the more liberal interpretation of the statute as found in Metropolitan Life Ins. Co. v. Evans, 183 Miss. 859, 184 So. 426 (1938) and discussed *supra* pages 147, 148.

[87]175 Miss. 631, 167 So. 68 (1936).

dissenting opinions. The accused's conviction of murder was affirmed by a divided Court. At the time for arraignment, counsel for the defendant asked for a continuance on the ground that the defendant was not physically fit to be arraigned or to testify in her own behalf. The trial judge directed that four doctors make an examination of Miss Keeton to determine her physical ability to stand trial. Upon a report that the defendant was in sufficiently good health to stand trial, no objection was taken by counsel. However, it was argued on appeal that this was error, especially in view of the fact that the defendant, subsequent to the examination, entered a plea of insanity.[88] It must have been counsel's idea that the appointed examiners could not have made a physical examination without also going into the matter of the accused's alleged insanity and in this manner making their testimony incompetent. However, this argument presupposed that the relationship of physician and patient existed. In any event it was held by the Court that there was no error in the trial judge's ordering the examination, as it had only gone into the accused's physical ability to stand trial.

Touching the matter of insanity as a defense, the accused introduced lay and expert witnesses. The State called six doctors who testified to the effect that the defendant was sane. The defendant objected to the receipt of this evidence on the ground that their testimony concerning her mental condition was privileged and not admissible under the statute. One of the six doctors called by the State had been the family physician, but had never had occasion to treat this defendant. He had seen her on a number of occasions and testified that, from such knowledge, it was his belief that the defendant was sane. In considering the question whether or not this portion of his testimony was competent, the majority of the Court took the position that the relation of physician and patient did not exist and that this doctor was a qualified witness.

After the accused had been arrested, this same doctor had been called by members of her family to treat Miss Keeton. As to his knowledge thus gained, the family physician further testified that he believed the accused to be sane. The admission of this second expression of opinion was held to be error due to the fact that as to this information the relationship of physician and patient did exist and that, as a result, information learned therefrom was privileged. The Court refused to reverse for this error because of the fact that counsel had made no further objection looking to a separation of the competent and incompetent evidence.

[88]175 Miss. 631, 652, 167 So. 68, 73 (1936). Note Justice Ethridge's description: ". . . the crime here charged is so horrible in conception, so iniquitous in outline, so damnable in detail, so inhuman and fiendish in execution, as to leave no choice except to elect between insanity and total human depravity."

As to the other five physicians called by the State, it was held to be no error to receive their testimony. Upon this point the Court had this to say through Justice Anderson:

> "The other physicians examined appellant with the view of ascertaining and testifying in the trial as to whether she was sane or insane; they were requested to do so either by officers representing the state or by counsel; their examination had nothing to do with the treatment of appellant as physicians."[89]

III

The statute itself provides for a waiver of the privileged communication "at the instance of the patient."[90] It is for the patient to make the claim of privilege, as it is really a matter between such patient and the court. Thus, if a party litigant desires to put in privileged communications which passed between himself and his physician, the party against whom the testimony is brought has no right to claim the privilege in his own behalf. In other words, it is the privilege of the patient and the physician-witness cannot claim it if his patient has not seen fit to do so.[91] It has been thus put:

> "The statute in plain and unambiguous language limits the right to waive the privilege to the physician's patient, and the right must be so limited by the courts, unless the manifest reason and obvious purpose of the statute would be sacrificed by adhering to a literal interpretation of its language."[92]

From the foregoing discussion we have seen that our Court is really very quick and eager to find that the required relationship exists. However, it would seem that many courts have also been rather liberal in finding, in close cases, that the privilege has been waived in some manner and the statutory exemption thereby lost. Indeed, statutes in many of the other jurisdictions have very liberal provisions as to waiver of the privi-

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[89]175 Miss. 631, 649, 167 So. 68, 72 (1936). Ethridge, J., dissenting, with whom Cook, J., agreed as to this point, took the position that it was reversible error to admit the testimony of the family physician, because of the undue weight that would probably be given it by the jury. Justice Ethridge was also of the opinion that the testimony of the other doctors for the State were incompetent.

[90]Miss. Code Ann. (1930) § 1536.

[91]Sovereign Camp, W. of W. v. Farmer, 116 Miss. 626, 645, 77 So. 655, 656 (1917). See also, 8 Wigmore, Evidence §§ 2192, 2386; Legislation (1933) 81 U. of Pa. L. Rev. 755, 756.

[92]McCaw v. Turner, 126 Miss. 260, 271, 88 So. 705 (1921).

lege.[93] It was justifiably noted that the Mississippi Courts have not been so liberal in this regard when it was said, in reference to the case of *Provident Life & Acc. Ins. Co. v. Jemison*:[94]

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[93]Necessary limitation of space makes it impossible to give herein an exact quotation from the statutes of all of the states with a privileged communications statute. These representative examples are given in the hope that interested readers might pursue them even further: ARIZ. REV. CODE ANN. (Struckmeyer, 1928) § 4412 (if a person offers himself as a witness and voluntarily testifies with reference to the communications, his consent is deemed to be given to the examination of his physician); ARK. DIG. STAT. (Pope, 1937) § 5159 (if two or more physicians are in attendance and one is called to testify or the privilege is otherwise waived, it is likewise waived as to others who were in attendance); CAL. CODE CIV. PROC. (Deering, 1939) § 1881 [The executor or administrator may waive in certain cases; the bringing of a personal injury action is deemed to be a consent that the patient's physician may testify if his testimony is material to the action. Unfortunately this very liberal provision has received a rather strict construction, *e.g.*, see Webb v. Lewald Coal Co., 214 Cal. 182, 4 P. (2d) 532, 77 A. L. R. 675, 679 (1931). This particular statute has been copied in a number of western states.]; COLO. STAT. ANN. (Michie, 1935) c. 177, § 10 (if the patient offer himself or his physician as a witness, a waiver is deemed as to other physicians); D. C. CODE (1929) tit. 9, § 20 (the legal representative may waive); KAN. GEN. STAT. ANN. (Corrick, 1935) § 60-2805 (if any person testify without the patient's objection as to communications, the physician may also testify on the same subject); MICH. STAT. ANN. (1935) § 27.911 (very good requirement as to waiver after the patient's death and will later be noted; in actions for personal injuries or for malpractice if the patient puts on any physician there is a waiver as to all other physicians; but see the practical difficulties encountered in obtaining physicians' testimony in malpractice suits discussed in *Report of the Committee on Improvements in the Law of Evidence* (1938) 63 A. B. A. REP. 570, 590); MINN. STAT. (Mason, 1927) § 9814 (permits the beneficiary of a life insurance policy to waive; no antecedent waiver is honored, however, unless made again at the trial); NEB. COMP. STAT. ANN. (Courtright, Supp. 1939) § 45-512 (if the patient offer himself as a witness and voluntarily testify with reference to the communication, the party to whom the communication was made may also testify); N. C. CODE ANN. (Michie, 1939) § 1796 (see provisions *infra* page 163; N. D. COMP. LAWS ANN. (1913) § 7924 (if a person offers himself as a witness it is deemed to be a consent to an examination of his physician on the same subject); OHIO CODE ANN. (Throckmorton, 1938) § 11494 (if the patient voluntarily testifies as to the communications, his physician may be compelled to testify on the same subject); OKLA. STAT. (Harlow, Supp. 1938) § 272 [if any person offers himself as a witness that is deemed a consent to an examination of his physician; the privilege ceases when an action is brought on an insurance policy in Okla.; Protective Ass'n. v. Montgomery, 160 Okla. 135, 16 P. (2d) 135 (1932)]; P. R. COMP. REV. STAT & CODES (1911) § 1409 (waiver is conclusively implied by the bringing of suit or by the patient's testifying to the communications to his physician); WIS. STAT. (1937) § 325.21 (the personal representative may waive); WYO. REV. STAT. ANN. (Courtright, 1931) § 89-1703 (if the patient voluntarily testifies, the patient's physician may be compelled to testify). As has been noted, *supra* note 7, there are eighteen states which do not have any statutory privilege. In most of the remaining states there are these very liberal requirements or provisions for a waiver. It is suggested that if the Mississippi Legislature feels that it must keep the statutory privilege, more liberal provisions for waiver should be made, *e.g.*, they could combine the California provision regarding the bringing of the action as a waiver with the Michigan provision as to the right of persons to waive the statute after the death of the patient, noted *infra* note 115.

[94]153 Miss. 53, 120 So. 180 (1928), *sugg. err. overr,* 153 Miss. 60, 120 So. 836 (1928).

> "A careful review of all these authorities, however, evinces the determination of that Court to strictly enforce and enlarge the provisions of the statute recognizing no implied waivers of the same whatsoever."[95]

May the statute be partially retained? If there are two disconnected transactions, *i.e.,* two physicians consulted at different times, the patient may waive the privilege as to one and retain it as to the other.[96] If the plaintiff voluntarily testifies as to fragments of communications between himself and his physician, the privilege is then surrendered by the plaintiff-patient, for he will not be allowed to partially retain the privilege in this manner.[97]

The two cases last mentioned[98] also present a very interesting procedural problem. Once the patient is on the stand, what effect is to be given an expression of willingness that his physician may testify? In the *Adams* case the patient was not required to answer the question as to whether or not he was willing that his physician testify as to his injury. It was held that this was no error.

> ". . . an affirmative answer would not have bound the appellee [patient] and his consent could have been obtained from him as well when he was off, as when he was on, the witness stand."[99]

In the *Simpson* case, on cross examination, the patient testified that he was willing that his physician testify as to the communications which had passed between them. On the theory that there had been a waiver of the privilege, the defendant called the plaintiff's physician. The plaintiff then claimed the privilege. Upon being recalled to the stand,

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[95]Note (1930) 2 MISSISSIPPI LAW JOURNAL 244, 245.

[96]Brookhaven Lbr. & Mfg. Co. v. Adams, 132 Miss 689, 97 So. 484 (1923). And in addition see, Epstein v. Penn. R. R., 250 Mo. 1, 156 S. W. 699, 48 L. R. A. (N.S.) 394, 400 (1913); Steinberg v. N. Y. Life Ins. Co., 263, N. Y. 45, 188 N. E. 152, 90 A.L.R. 642, 646 (1933); Cretney v. Woodmen Accident Co., 196 Wis. 29, 219 N. W. 448, 62 A. L. R. 675, 680 (1928); 28 R. C. L. p. 547, § 137. For some of the statutory provisions see note 93 *supra.* The situation where two or more physicians act in concert will be inquired into *infra* note 109.

[97]See, Coca-Cola Bot. Works of Greenwood v. Simpson, 158 Miss 390, 397, 130 So. 479, 481, 72 A. L. R. 143, 148 (1930). It was there said: "He [the patient] cannot remove the seal of secrecy from so much of the privileged communications as make for his advantage, and insist that it shall not be removed by so much as makes to the advantage of his adversary." As to the effect of a voluntary disclosure at the trial of one's physical condition at a certain time as a waiver of the privilege as regards testimony by his physician as to his condition at an earlier time see Apter v. Home Life Ins. Co. of N. Y., 266 N. Y., 333, 194 N. E. 846, 98 A. L. R. 1281, 1284 (1935).

[98]*Supra* notes 96 and 97

[99]132 Miss. 689, 697, 97 So. 484, 486 (1923).

the plaintiff testified to the effect that he did not know of the privilege when first asked. The objection to the physician's testimony was sustained by the lower court and this action was affirmed on appeal.[100] It was contended by the defendant that once the privilege had been waived that waiver could not be revoked. The Supreme Court acceded to this as a general proposition, but held that, where the patient expressed his willingness on the witness stand that his physician might testify, such expression was not a waiver of the privilege in the absence of consultation with counsel. It was further suggested by the Court that the answer under such circumstances was really not voluntary. Thus, it would seem that the patient must be aware of his privilege.[101]

It is common to provide for a contractual waiver of the privileged communications statute in policies of insurance and in contracts of employment. Naturally it is good protection to provide for such waiver. Such contractual waiver of privilege is not contrary to public policy.[102] In the first case presenting a contractual waiver problem, the Court took occasion to say:

> ". . . since one of the considerations upon which this policy was issued was the waiver by Farmer of such privilege, it follows that his physicians were competent witnesses, although they

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[100]Professor Wigmore has condemned the case as unsound and as a license to perjury. 8 WIGMORE, EVIDENCE §§ 2388, 2389. For the statutory material dealing with this and related problems see *supra* note 93.

[101]158 Miss. 390, 396, 130 So. 479, 480, 72 A. L. R. 143, 148 (1930).

[102]Fornea v. Goodyear Yellow Pine Co., 181 Miss. 50, 178 So. 914 (1937); Sovereign Camp, W. of W. v. Farmer, 116 Miss. 626, 77 So. 655 (1917). With the exception of two states, *i.e.*, New York and Michigan, the provisions for contractual waiver of the statutory privilege are valid and binding. See, N. Y. Life Ins. Co. v. Snyder, 116 Ohio St. 693, 158 N. E. 176, 54 A. L. R. 406, 412 (1927). Further see: 8 WIGMORE, EVIDENCE § 2388 (wherein the author expresses his opinion that the mere taking out of a policy of insurance should act as a waiver thereof, but without supporting authority); Emory, *Waiver of the Patient's Privilege* (1931) 6 WASH. L. REV. 71, 73; Legislation (1933) 81 U. OF PA. L. REV. 755, 761. In Note (1930) 2 MISSISSIPPI LAW JOURNAL 244, 245, it is suggested that the Court went astray in holding that there was no contractual waiver of the privilege in Provident Life & Acc. Ins. Co. v. Jemison, 153 Miss. 53, 120 So. 180 (1920), *sugg. err. overr.*, 153 Miss. 60, 120 So. 836 (1920) (it is in the latter opinion that we find the pertinent material). The health policy in the *Jemison* case provided: "If the Insured is disabled by 'such injury' or 'such sickness' for more than thirty days, he or his representatives shall, as a condition precedent to any liability of the Company hereunder, furnish the Company . . . every thirty days thereafter . . . with a report in writing from his attending physician or surgeon, fully stating the condition of the Insured and the probably [*sic*] duration of his disability." Compare with the quoted contract provision in note 103 *infra*.

obtained their knowledge of his condition while treating him professionally."[103]

There is a good bit of confusion in the cases as to implied waivers of the privilege. Many of the statutes have express provisions as to when the privilege shall be deemed to have been waived.[104] The conduct of the patient may indicate an intention to abandon the privilege and to open the doors to a full inquiry into the state of his health. There are situations in which there may be no evidence of an intention to waive the privilege, and yet many courts sometimes hold that it is waived because of the fact that it would be unfair and prejudicial to the other party to allow a plea of the privilege.[105]

What are some of the methods whereby the privilege is impliedly waived? Professor Wigmore rather strongly urges that the mere bringing of an action for personal injuries wherein one of the main issues is the actual existence of a physical ailment should operate as an implied waiver of the statutory exemption, due to the fact that the patient thereby discloses the matter and it is no longer confidential.[106] This suggestion was denied in *U. S. F. & G. Co. v. Hood*.[107]

Suppose that the patient goes on the stand and testifies in his own behalf as to his physical condition? Should such conduct operate as a waiver in order that his physician might be called and be required to give his testimony in that regard so that there could be an effective check on the patient's declarations? If it is the purpose of the privilege to pro-

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[103]Sovereign Camp, W. of W. v. Farmer, 116 Miss. 626, 645, 77 So. 655, 656 (1917). The contractual waiver was as to all "privileges and benefits of any and all laws which are now in force or may hereafter be enacted in regard to disqualifying any physician from testifying concerning any information obtained by him in a professional capacity." See *supra* note 102. The distinction is self-evident.

[104]See the various statutes briefly noted in note 93 *supra*. In this particular field there is no more perplexing problem than that of implied waiver. A complete article could be written on that subject alone. Thus, with apologies, a few of the problems only are herein discussed.

[105]8 WIGMORE, EVIDENCE § 2388; Emory, *Waiver of the Patient's Privilege* (1931) 6 WASH. L. REV. 71, 73.

[106]5 WIGMORE, EVIDENCE § 2389. Waiver is nearly always found if the patient is suing his physician for malpractice. Here again many of the statutes make an express exception from the operation of the privilege, *e.g.*, COLO. STAT. ANN. (Michie, 1935) c. 177 § 9; MICH. STAT. ANN. (1935) § 27.911; NEV. COMP. LAWS (Hillyer, 1929) § 8974; WIS. STAT. (1937) § 325.21. In order to determine whether or not there was any malpractice, it is necessary for the physician to be free to show exactly what did take place. See Capron v. Douglas, 193 N. Y. 11, 85 N. E. 827, 20 A. L. R. (N. S.) 1003 (1908).

[107]124 Miss. 548, 87 So. 115, 15 A. L. R. 605 (1920). Note the able argument of counsel at page 553 in the Mississippi Reports. See in accord the suggestion in Note (1928) 12 MINN. L. REV. 390, 400, wherein it is said: ". . . the privilege is either an empty and meaningless fetish, or a perfect protection for fraud and chicanery."

tect the matters communicated from publicity, that purpose is defeated when the patient testifies in court as to his infirmities. The reason for the privilege having ceased, the privilege itself should cease. It appears that some jurisdictions have taken the position that whether or not there has been an implied waiver must depend upon the detail into which the patient testified or whether there was a reference by the patient to the communications which passed between himself and his physician.[108]

If the patient calls one of his physicians to the stand and has him testify as to his (the patient's) physical condition, is it then open to the other party to introduce the testimony of the other physicians of the patient?[109] In *Hamel v. Southern R. R.*[110] that question was left open. There the plaintiff had introduced no medical testimony in direct. However, after the defendant was allowed to put in the testimony of one of the plaintiff's physicians, plaintiff countered with the testimony of still another of his physicians. This was held to be no waiver as to the physician brought forward by the defendant. The Court would not express an opinion as to what the result would have been had the plaintiff first introduced his physician in direct. Would it have "thereby opened the door to a full inquiry on that particular subject which she had thus put in issue in the case by the testimony of any physician in charge of the patient"?[111]

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[108]In Coca-Cola Bot. Works of Greenwood v. Simpson, 158 Miss. 390, 397, 130 So. 479, 481, 72 A. L. R. 143 (1930), there is a dictum to the effect that there may be this implied waiver under such circumstances. There is a similar dictum in Metropolitan Life Ins. Co. v. Evans, 183 Miss. 859, 870, 184 So. 426, 427 (1938). However, it may be safely said that the state of the authorities in Mississippi is unsettled as to this point. See also Harpman v. Devine, 133 Ohio St. 1, 10 N. E. (2d) 776, 114 A. L. R. 789, 798 (1937) and the host of cases there noted; 28 R. C. L. p. 544, § 134; 8 WIGMORE, EVIDENCE § 2389. Again, refer to the statutory material in note 93 *supra*. In regard to the effect of a waiver of the privilege at one trial as effecting the patient's right to make an objection on subsequent trials, there is a rather even division of authority. On this point see: Billingsley v. Gulick, 256 Mich. 606, 240 N. W. 46, 79 A. L. R. 166, 173 (1932); Elliott v. Kansas City, 198 Mo. 593, 96 S. W. 1023, 6 L. R. A. (N.S.) 1082 (1906).

[109]Generally where there is an examination of one of two or more physicians who were present and attended the patient at the same consultation, it is a waiver as to the others. See: Epstein v. Penn. R. R., 250 Mo. 1, 156 S. W. 699, 48 L. R. A. (N.S.) 394, 398 (1913); Cretney v. Woodman Accident Co., 196 Wis. 29, 219 N. W. 448, 62 A. L. R. 675, 680 (1928). See note 96 *supra* as to disconnected transactions.

[110]113 Miss. 344, 357, 74 So. 276, 277 (1917).

[111]113 Miss. 344, 357, 74 So. 276, 277 (1917). Note the argument of defendant's counsel in U. S. F. & G. Co. v. Hood, 124 Miss. 548, 553, 87 So. 115, 15 A. L. R. 605 (1920). Newton Oil Mill v. Spencer, 116 Miss. 568, 573, 77 So. 605, 606 (1917) cites Yazoo & M. V. R. R. v. Messina, 109 Miss. 143, 67 So. 963 (1915), as settling the proposition that there was no implied waiver under such circumstances. See note 55 *supra*.

For a time it seemed that it was fairly well settled that there was no waiver to be implied from such conduct.[112] Later we have the *Keeton* case[113] wherein it was said by Justice Anderson, by way of dictum:

> "Furthermore, he is of the opinion that where the subject-matter of the privileged communication is made an issue in the case (whether civil or criminal) and the party making it an issue divulges the matter by introducing one or more of his physicians, the ban of secrecy is lifted—the confidential matter is thereby published to the world, and the way is opened for the other side to go into the question in the same way. Such action constitutes waiver. . . . The decisions of our court to the contrary, the writer thinks, ought to be overruled; the construction put upon this statute comes dangerously near, in a civil case, violating, if it does not actually do so, the equal protection clause of the Federal Constitution."[114]

It is therefore suggested, and much to be hoped for, that the courts will adopt a more liberal construction of the statute as to this troubling point and that in the future they will be more willing to find a waiver than has been their tendency in the earlier adjudications.

May the statute be waived by the heirs or personal representatives of the deceased patient? Here, too, there is much confusion except in those jurisdictions wherein an express authorization for waiver after the death of the patient is made.[115] In some of the jurisdictions it is held that the personal representative of the patient may waive the statutory exemption. In still others, it is held that the statutory privilege can be waived by the patient alone.[116] Whatever the rule may be elsewhere, it is rather

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[112]See Brookhaven Lbr. & Mfg. Co. v. Adams, 132 Miss. 689, 698, 97 So. 484, 486 (1923); Davis v. Elzey, 126 Miss. 789, 809, 88 So. 630, 633 (1921), *sugg. err. overr.*, 126 Miss. 811, 89 So. 666 (1921).

[113]175 Miss. 631, 167 So. 68 (1936).

[114]175 Miss. 631, 648, 167 So. 68, 71 (1936). *Cf.* the dissenting opinion of Stevens, J., in the second appeal of Yazoo & M. V. R. R. v. Messina, 111 Miss. 884, 889, 72 So. 779, 781 (1916).

[115]Note the examples briefed in note 93 *supra*. Michigan seems to have the best provisions. It is there provided: "Provided further, that after the decease of such patient, in a contest upon the question of admitting the will of such patient to probate, the heirs at law of such patient, whether proponents or contestants of his will, shall be deemed to be personal representatives of such deceased patient for the purpose of waiving the privilege hereinbefore created. MICH. STAT. (1935) § 27.911. Even though it did not pass, H. B. 588, quoted *supra* note 12, was headed in the right direction when it provided for waiver at the "instance of the patient, his personal representatives or his heirs, next of kin or assigns."

[116]Schornick v. Schornick, 25 Ariz. 563, 220 Pac. 397, 31 A. L. R. 159, 167 (1923); Nat. Annuity Ass'n v. McCall, 103 Ark. 201, 146 S. W. 125, 48 L. R. A. (N.S.) 418, 420 (1912). See 8 WIGMORE, EVIDENCE § 2391, where it is said: "Except in two or three jurisdictions, it is usually agreed that the deceased's representative (and probably also the heir) may waive the privilege." See also 28 R. C. L. p. 543, § 133. As to waiver by the beneficiary of an insurance policy, see Maine v. Maryland Casualty Co., 172 Wis. 350, 178 N. W. 749, 15 A. L. R. 1536, 1544 (1920).

definitely decided in Mississippi that the parties standing in a representative capacity to the deceased patient may not waive the privilege afforded by the statute. It has been held:

> "The statute does not limit the privilege to the life of the patient, neither does it confer upon his heirs or devisees who may quarrel over his property the right to tarnish his reputation by causing his physician to disclose his infirmities."[117]

On the other hand it has been held that one who stands in *loco parentis* may waive the statute for the benefit of a minor.[118]

IV

About fifteen years ago, in speaking of the growth and extension of privileges generally, one of the leaders in the fight for reform in our evidentary rules had this to say:

> "The trend of the day is to expand them as if they were large and fundamental principles, worthy of pursuit into the remotest analogies."[119]

The Mississippi cases noted above—some forty or more—evince much confusion in the judicial opinions. The reason for this seems to

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[117]McCaw v. Turner, 126 Miss. 260, 271, 88 So. 705 (1921). Nor may the widow waive the statute as to her deceased husband even though the testimony of her husband's physician would not discredit his patient. Watkins v. Watkins, 142 Miss. 210, 106 So. 753 (1925). See Vance v. State, 182 Miss. 840, 860, 183 So. 280, 284 (1938). For an amusing statutory provision see PA. STAT. (Purdon, 1936) tit. 28, § 328, wherein it is provided that if the communication were revealed, to be privileged, it must be such as would tend to blacken the character of the patient. As to what tends to blacken the character see Metropolitan Life Ins. Co. v. Scruch, 284 Pa. 209, 131 Atl. 186 (1925). Suggested amendments to our statute have been made, *e.g.*, 1939 Meeting of the Mississippi State Bar Ass'n. See *Proceedings of the Thirty-Fourth Annual Meeting of the Mississippi State Bar* (1939) 11 MISSISSIPPI LAW JOURNAL 508, 509. The objection there made to the proposed amendment would carry no weight at all if the Legislature enacted provisions similar to those found in Michigan and quoted in note 115 *supra*. Then there would be no problem of controlling the testimony of the physician of the deceased patient. Due to impatience, no affirmative action was taken at that meeting. However, the Junior Bar Section and its former Chairman, Hon. John C. Satterfield, are to be complimented for their efforts and it is to be hoped that they will be carried on.

[118]Jenkins v. State, 146 Miss. 339, 111 So. 435 (1926), by a divided court. By implication such would be the proper ruling according to dicta in Dixie Greyhound Lines, Inc. v. Matthews, 177 Miss. 193, 170 So. 686, 108 A. L. R. 134 (1936). See also Nat. Annuity Ass'n v. McCall, 103 Ark. 201, 146 S. W. 125, 48 L. R. A. (N.S.) 418, 420 (1913); 28 R. C. L. p. 542, § 132.

[119]8 WIGMORE, EVIDENCE § 2192. This same author has suggested that the privilege was becoming "a burlesque upon logic and justice"; see, *id.* at § 2398. For the attitude of one of America's leaders at the trial bar who condemned the privilege in an address to the Maryland Bar Association in 1932, see Whipple, *The Legal Privilege of Concealing the Truth* (1925) 10 MASS. L. Q. 31. For further views of that attorney, see Whipple, *The Duty of Disclosure* (1922) AM. L. REV. 801.

be due to two factors: the Courts could have reached far happier results with a more liberal interpretation of the statute as written, and the Legislature could have followed the lead of so many other states in providing a more workable and satisfactory statute. But, the courses open were not taken. Even though at times it appears that the Court has gone out of its way to uphold the privilege even in those cases where the health of the patient was an issue very vital to the adjudication, it is some consolation to note that the more recent cases show a desire on the part of the Court to restrict the privilege whenever possible.[120]

With the defeat of the attempted amendment of our statute still ringing in our ears, practical suggestions seem to be particularly appropriate:

(1) The statute should be repealed and the privilege absolutely abolished. Looking to the jurisdictions around us where no privilege exists, it cannot be said that the medical profession in those states is having a hard struggle because of the fact that their patients dare not reveal all of the information necessary for a proper diagnosis and prognosis. More than that, since the protection of the statute may be waived by a patient, it cannot be said to be a rule of evidence founded in public policy. However, to repeal the statute entirely would be an almost impossible task for the reason that, at first blush, the statute appeals to those who are uninitiated and unfamiliar with the harm that can flow from such a statutory exemption.

(2) The statute should be amended. There are faults to be found in all similar statutes, but desirable sections could be chosen from various ones, with a view toward attaining a statute more attuned to the times and better designed to the reaching of desirable results. Section 1798 of the North Carolina Code of 1939 provides:

> "No person, duly authorized to practice physic or surgery, shall be required to disclose any information which he may have acquired in attending a patient in a professional character, and which information was necessary to enable him to prescribe for

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[120]Killings v. Metropolitan Life Ins. Co., 187 Miss. 265, 192 So. 577 (1940); Metropolitan Life Ins. Co. v. Evans, 183 Miss. 859, 184 So. 426 (1938); Keeton v. State, 175 Miss. 631, 167 So. 68 (1936); Gulf M. & N. R. R. v. Willis, 171 Miss. 732, 157 So. 899 (1934), *sugg. err. overr.*, 171 Miss. 739, 158 So. 551 (1935). In speaking for the Court, Ethridge, J., in Provident Life & Acc. Ins. Co. v. Chapman, 152 Miss. 747, 759, 118 So. 437, 440 (1926), had this to say: "The courts are not concerned with the wisdom, or lack of wisdom, of legislative enactments. We must presume that the legislature was sufficiently moved by consideration for public welfare to enact the statute, and we should treat the statute so as to carry out the legislative policy."

such patient as a physician, or to do any act for him as a surgeon; Provided, that the presiding judge of a superior court may compel such disclosure, when, in his opinion the same is necessary to a proper administration of justice."[121]

From a theoretical standpoint this seems to be the most desirable statute which has been enacted. But as a practical matter, elective trial judges might not take advantage of this discretion and demand enlightenment for the jury in order that the validity of the plaintiff's claims might be put to the test of the revealing light of truth—unfettered by the technicalities of privilege.[122] There is a present day trend to vest more and more discretion in the trial judge. If he would, he *could* determine whether the request for the confidential communication was *bona fide* and imperatively required for the ends of justice or whether its evident purpose was merely to harass and annoy the patient. Vest this authority in a judge of unquestionable integrity, of high morals, and of certainty in convictions, and the truth will be revealed in the courtroom before the appointed triers of fact as well as on the street corner.[123]

(3) With some misgiving, the writer proposes the following statute:

"No person, duly authorized to practice physic or surgery in this or any other State, shall be required to disclose any information which he may have acquired in attending a patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon, except at the instance of the patient, or, after his death, at the instance of his personal representatives;[124]

"Provided, however, that consent shall be deemed to have been given to any physician or surgeon in every civil suit, action or

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[121]The Committee on Improvements in the Law of Evidence of the American Bar Association recommended the enactment of the second clause of this statute; (1938) 63 A. B. A. Rep. 570, 590.

[122]The Supreme Court of North Carolina seems to have restricted the liberality of the statute to a degree, *e.g.*, see: Sawyer v. Weskett, 201 N. C. 500, 160 S. E. 575 (1931); Metropolitan Life Ins. Co. v. Boddie, 194 N. C. 199, 139 S. E. 228 (1927).

[123]A note of optimism is found in McCormick, *The Scope of Privilege in the Law of Evidence* (1938) 16 Tex. L. Rev. 447, 469: "One may hazard a guess, however, that in a secular sense privileges are on the way out. Perhaps the route they will take is the path from rule to discretion. If the trial judge is permitted a leeway, he can prevent those disclosures of marital or professional secrets which needlessly shock our feelings of delicacy, but at the same time he can override these minor amenities when it appears necessary in order to secure the facts essential to do justice in the case before him."

[124]See N. C. Code Ann. (Michie, 1939) § 1798.

prosecution which has been brought by any person for damages on account of personal injuries or death and in all cases in which a party to a suit, action or proceeding shall offer himself or any physician or surgeon or any other person as a witness to testify to the physical or mental condition of such party;[125]

"And provided further, that after the decease of such patient, in a contest upon the question of admitting the will of such patient to probate, the heirs at law of such patient, whether proponents or contestants of his will, shall be deemed to be personal representatives of such deceased patient for the purpose of waiving the privilege hereinbefore created."[126]

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[125]See HAWAII REV. LAWS (1935) § 3829.
[126]See MICH. STAT. ANN. (1935) § 27.911.

ADMINISTRATIVE POLICY TOWARD SECURITY ISSUES UNDER THE PUBLIC UTILITY HOLDING COMPANY ACTS*

William N. Ethridge, Jr.†

Hyper-centralized control divorced from ownership, ineffective state regulation, and gross financial abuses in the utility industry implemented the passage of the Public Utility Holding Company Act of 1935.[1] Although its authority extends only to the great interstate public utility holding companies and their subsidiaries, this Act, with the exception of those statutes fixing the jurisdiction and powers of the Interstate Commerce Commission, represents the sole adequate governmental attempt to thoroughly regulate and supervise the various phases of corporate organization, finance, and management of a field of American industry.

The only practical control is a careful supervision over all security transactions and the use of the acquired capital by each unit of these various systems. With this fact evident, the Congress established under the Act two major objectives: (1) the geographic integration and economic simplification of these holding company systems (the so-called "death sentence" provision), and (2) a continuing process of administrative reg-

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[1] 49 STAT. 803 (1935), 15 U. S. C. A. § 79 (Supp. 1938).

For voluminous and significant reports upon the utility industry prior to passage of the Act, see Fed. Trade Comm. Report on the Economic, Financial and Corporate Phases of Holding and Operating Companies of Electric and Gas Utilities, SEN. Doc. No. 92, 70th Cong., 1st Sess. (1935) (consisting of 84 Vols.); Report of National Power Policy Committee, on Public Utility Holding Companies, H. R. Doc. No. 137, 74th Cong., 1st Sess. (1935); Report of the Committee on Interstate and Foreign Commerce, H. R. REP. No. 827, 73rd Cong., 2d Sess. (1934).

This article is based primarily upon the published release of the SEC through Northeastern Water and Electric Corp., H. C. Act Rel. No. 2314 (Oct. 2, 1940). However, where the opinions have been published in the official "Securities and Exchange Commission Decisions and Reports," those volumes are cited in lieu of the mimeographed releases. Other official publications used are: 1, 2, 3, 4, 5 REP. S. E. C. (1935, 1936, 1937, 1938, 1939) respectively; S. E. C., General Rules and Regulations under the Public Utility Holding Company Act of 1935 (as amended to and including Aug. 15th, 1939). See also BERLE AND MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932) 127 *et seq.;* BONBRIGHT AND MEANS, THE HOLDING COMPANY (1932).

The Act is divided into two Titles. Title One, administered by the SEC, deals with public utility holding companies; and Title Two, with administrative authority in the Fed. Power Commission, regulates interstate shipments of power which are subject to no effective state control. Unless stated otherwise, all references in this article are to Title One.

ulation of the issuance and sale of the securities and of the various corollary financial practices of these holding companies and their subsidiaries.[2] Proceedings have only just begun upon the former objective,[3] but for the past five years the Securities and Exchange Commission has been building an efficient body of administrative law to govern the issuance and sale of holding and operating-company securities.

The Commission has two major functions with respect to investors: (1) to see that the holders of outstanding securities are treated fairly when difficulties arise, and (2) in supervising the issuance of new securities to see that future investors are not put in a position where they may be unfairly dealt with. Sections 6 and 7 of the Act provide the basis for the control of the issuance and sale of securities by registered holding companies and their subsidiaries. Under them a declaration must be filed setting out certain facts about the proposed issue, which, according to Section 7 (c), must be bonds or stock of a specified type or be issued for one or more of four purposes.[4] In actual administration subsection (c)

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[2]Even under the Holding Company Act, "the Commission is limited to considering the matter in the light of applicable statutory standards, and it does not pass judgment on the investment value of the securities which it permits to be issued." Sec. 28: it is unlawful "to represent or imply in any manner whatsoever that such security has been guaranteed, sponsored, or recommended by the U. S. or any agency or officer thereof." See Consumers Power Company, H. C. Act Rel. No. 1854, at 14, n. 24 (1939). Sec. 2 (a) (5): "'Public utility company' means an electric utility company or a gas utility company."

[3]See *e.g.*, H. C. Act Rel. No. 1958 (1940), and Standard Power and Light Corp. H. C. Act Rel. No. 1957 (1940); H. C. Act Rel. No. 1959 (1940), and The North American Co. and its Subsidiary Companies, H. C. Act Rel. No. 1960 (1940); The United Light and Power Co. and its Subsidiary Companies, H. C. Act. Rel. No. 1961 (1940).

[4]Sec. 7 (c): "The Commission shall not permit a declaration regarding the issue or sale of a security to become effective unless it finds that—

(1) such security is (A) a common stock having a par value and being without preference as to dividends or distribution over, and having at least equal voting rights with, any outstanding security of the declarant; (B) a bond (i) secured by a first lien on physical property of the declarant, or (ii) secured by an obligation of a subsidiary company of the declarant secured by a first lien on physical property of such subsidiary company, or (iii) secured by any other assets of the type and character which the Commission by rules and regulations or order may prescribe as appropriate in the public interest or for the protection of investors; (C) a guaranty of, or assumption of liability on, a security of another company; or (D) a receiver's or trustee's certificate duly authorized by the appropriate court or courts; *or*

(2) such security is to be issued or sold solely (A) for the purpose of refunding, extending, exchanging, or discharging an outstanding security of the declarant and/or a predecessor company thereof or for the purpose of effecting a merger, consolidation, or other reorganization; (B) for the purpose of financing the *business* of the declarant as *a public-utility company;* (C) for the purpose of financing the business of the declarant, when the declarant is neither a holding company nor a public-utility company; and/or (D) for necessary and urgent corporate purposes of the declarant where the requirements of the provisions of paragraph (1) would impose an unreasonable financial burden upon the declarant

has caused very little difficulty and has not affected financial policy to any extent.

The policy of the Holding Company Act is not only postulated upon supervising the terms of individual security issues, but also upon regulating and directing every security issued within the proper channels of an economically sound synthesis. Because a financially unsound security may easily come within the terms of the above-mentioned subsection (c), the most useful and efficient devices which the Commission has to control financial and ethical trends in those multifarious aspects of corporate securities are the divers standards of subsection (d) of Section 7. Under this subsection, it may refuse to allow utility securities to be issued if it finds that they are not reasonably adapted to the security structure [Section 7 (d) (1)], or the earning power [Section 7 (d) (2)]; or that the financing by a particular security is not necessary or appropriate to the economical or efficient operation of the business [Section 7 (d) (3)]; or that the underwriters' fees are not reasonable [Section 7 (d) (4)];[5] or that the terms and conditions are detrimental to the public interest or to the interest of investors or consumers [Section 7 (d) (6)].[6]

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and are not necessary or appropriate in the public interest or for the protection of investors or consumers. . . ."

Because of the provisions of clause (B) of paragraph (2), the standards of paragraph (1) are applicable primarily to *holding-company securities* issued to raise funds for *holding-company purposes,* but even this application may be avoided if the Commission finds it would impose an unreasonable financial burden on the issuing holding company. See Address of SEC Comm'r George C. Mathews, *Regulation of the Holding Company under the Federal Public Utility Act of* 1935, before a class in the School of Commerce, Northwestern University, Oct. 14, 1935.

[5]This particular phase of marketing securities is not within the scope of this paper. The Commission has not as yet formulated a satisfactory rule or theory on "arm's-length bargaining." N. Y. Times, May 5, 1940, § F., p. 3.

[6]Sec. 7 (d): "If the requirements of subsections (c) and (g) [giving proper state Commissions power to prevent issues] are satisfied, the Commission shall permit a declaration regarding the issue or sale of a security to become effective unless the Commission finds that—

(1) the security is not reasonably adapted to the security structure of the declarant and other companies in the same holding-company system;
(2) the security is not reasonably adapted to the earning power of the declarant;
(3) financing by the issue and sale of the particular security is not necessary or appropriate to the economical and efficient operation of a business in which the applicant lawfully is engaged or has an interest;
(4) the fees, commissions, or other remuneration, to whomsoever paid, directly or indirectly, in connection with the issue, sale, or distribution of the security are not reasonable;
(5) in the case of a security that is a guaranty of, or assumption of liability on, a security of another company, the circumstances are such as to constitute the making of such guaranty or the assumption of such liability an improper risk for the declarant; or
(6) the terms and conditions of the issue or sale of the security are detrimental to the public interest or the interest of investors or consumers."

Northeastern Water and Elec. Corp., H. C. Act Rel. No. 2314 (1940) at 2-A: "When, in 1935, Congress enacted the Public Utility Holding Company Act, it

The unusual terminology adopted in this subsection states that the Commission shall permit an issue "unless the Commission finds that" the security fails to meet the above-mentioned standards. The use of the word "unless" does not relieve the Commission of its duty to examine the facts of the case to determine whether or not an adverse finding is required. It is on the basis of this interpretation that the Commission applies the standards of Section 7 to reorganization plans arising under Section 11 (f).[7] The official version of this phraseology is the following:

> "For 'unless' means 'if not'. Accordingly, to say that an act is to be permitted 'unless' the Commission finds that certain facts are non-existent is the same as saying that that act is not to be permitted if the Commission finds certain facts to exist."[8]

In approaching a matter under subsection (d) the decisions of the state commissions which have jurisdiction over the business and assets of a declarant are entitled to considerable weight.[9] However, Congress directed the Commission to apply certain standards to issues of securities coming within Section 7, and specified under Section 7 (g) that state commission approval should be a necessary but not a sufficient condition. In short, since the SEC is directed to regard disapproval by a state commission and not approval by such a commission, such approval is not controlling in making findings under subsection (d). [10]

In the refinancing of a subsidiary the Commission has "consistently differentiated" between the issue and sale of securities whose proceeds were to be used to refund or retire existing debts with a resultant decrease of fixed charges and new security issues which would add substantially

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modelled Section 7 (d) of that Act on the provisions of Section 20 of the Transportation Act of 1920; Congress, however, granted this Commission somewhat more extensive duties and powers as to utility security issues than had been granted to the ICC with respect to railroad securities in the preceding 15 years."

[7]Peoples Light and Power Co., 2 S. E. C. 829, 844 (1937); Consumers Power Co., H. C. Act Rel. No. 1854 (1939) at 15, 26 n.

[8]Consumers Power Co., H. C. Act Rel. No. 1854 (1939) at 15, 26 n.

[9]Public Service Co. of N. H., 4 S. E. C. 100 (1938); Consumers Power Co., H. C. Act Rel. No. 1854 (1939) at 29.

[10]Consumers Power Co., H. C. Act Rel. No. 1854 (1939) at 29 and 30.

It often happens that the state statutes do not require the state commission to consider the same issues that the SEC must consider under Sec. 7 (d). For example, in the *Consumers Power Case*, at 30, it was observed that the applicable Michigan statutes require its Commission "to determine whether or not the *use* of the capital" is reasonably required for the purpose proposed. The Michigan Commission did not have the duty and had not made any findings upon whether the sale of the bonds was or was not "necessary or appropriate" to economical and efficient operation. Its approval of the security issue therefore had no weight in determining that particular point. 2 MICH. COMP. LAWS (1939) c. 208, § 11077.

to the existing corporate debt.[11] The great majority of the cases in which the standards of subsection (d) have been discussed to any extent have involved refunding rather than new-money issues, and in such operations the Commission generally attempts to determine (1) whether the proportion of debts to equity investment is high, and (2) whether the earnings amply cover the fixed charges. Refunding issues, in addition to reducing fixed charges, generally present a "special problem" because of an already existing unbalanced capital structure and the financial necessity of meeting maturing obligations.[12] Hence the Commission has approved refunding issues under paragraph (1) where the capital structures were considerably more unbalanced than those of companies whose new-money issues were disapproved under paragraph (3).[13] In other terms, the Commission has permitted refunding bond issues to be sold where the ratio of debt to total capitalization was "relatively high and where the ratio of common stock and surplus (the common stock 'cushion') to total capitalization was relatively low."[14] However, in only a few of these cases has the debt been increased at all and then by a small amount in order to meet the expenses of the refunding operations; but even under such circumstances the increase was temporary, because of provisions made for its rapid retirement.[15] In short, although under the Act the same standards are applicable to refunding issues as to new issues, the standards as a practical matter are often relaxed in favor of refunding operations.[16] On the other hand, of course, there may be circumstances in which the Commission could not even permit refunding bonds to be issued. Such issues definitely will not be authorized if the debt ratios are "dangerously high, or if other conditions exist which clearly transgress the applicable standards of the Act."[17]

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[11]Southewestern Gas and Electric Co., H. C. Act Rel. No. 1931 (1930) (where the bonds were solely for refunding, involving no increase in debt).

[12]See Comment (1940) 49 YALE, L. J. 746, 747; General Public Utilities, Inc., H. C. Act Rel. No. 2253 (1940), at 5.

[13]Public Service Co. of Colo., H. C. Act Rel. No. 1701 (1939) as compared with, for example, Consumers Power Co., H. C. Act Rel. No. 1854, (1939). See Comment (1940) 49 YALE, L. J. 492, 509.

[14]Chairman Frank, in Southwestern Gas and Electric Co., H. C. Act Rel. No. 1931 (1940) at 16; Republic Service Corp., 2 S. E. C. 44 (1937).

In refunding issues under the 6(b) exemption Section 7(d) is not applicable: Public Service Co. of Ind., H. C. Act Rel. No. 1826 (1939); Central Ill. Electric and Gas Co., H. C. Act Rel. No. 1591 (1939); Northern Ind. Public Service Co., H. C. Act Rel. No. 1836 (1939).

[15]Penn. Power and Light Corp., H. C. Act Rel. No. 1687 (1939).

[16]See Public Service Co. of Colo., H. C. Act Rel. No. 1701 (1939), Comm'r Healy dissenting at p. 65.

[17]Chairman Frank, in Southwestern Gas and Electric Co., H. C. Act Rel. No. 1931 (1940) at 17.

Public Service Commission of Colorado[18] well illustrates the liberal attitude the Commission has adapted toward refunding issues. By deducting write-ups in the property account from the book figures it was made clear that the debt ratio was excessive. But the majority of the Commission recognized certain mitigating factors justifying the proposed redemption of declarant's outstanding funded debt and the issuance of new bonds and debentures and of par-value common stock to retire an existing indebtedness. Declarant's common was acquired by its parent without any cash outlay whatsoever (on the contrary, the parent profited), and the resulting intercompany appreciation was still reflected in declarant's accounts. Hence the problem was whether the proposed financing would, to the detriment of investors or consumers or the general public, aggravate or unecessarily prolong the consequences of these transactions.

Paragraph (2) requires that the issue be "reasonably adapted to the earning power of the declarant." Declarant's income had steadily increased for fourteen years, there had been no defaults of any kind in interest or preferred dividends, and there was a substantial record of common stock dividends. Moreover, declarant's future earning capacity was indicated by the facts that the coverage of interest on funded debt had never been less than 1.66 times, the proposed financing would result in a net annual cash saving of $537,252 in fixed charges; and, although there had been certain rate reductions recently effected, there was a possibility of further substantial reductions which could be absorbed without jeopardizing the senior securities.

In the instant case the *pro forma* capitalization would be 60.59 per cent funded debt, 11.82 per cent preferred stock, and 27.59 per cent common stock and surplus. The Commission did not think that the ratio of funded debt to be outstanding would, on the basis of book capitalization, be excessive in relation to the security structure. The entire common stock held by the parent was acquired without any net cash outlay on its part; hence the book figures could not be considered as an accurate guide in determining whether the equity underlying the public-held funded debt and preferred stock would be adequate. However, because of some doubt as to intercompany appreciation and the inadequacy of the consideration paid, because there remained considerable latitude for judgment as to the weight to be assigned to intercompany appreciation in measuring the equity of

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[18]H. C. Act Rel. No. 1701 (1939); see Comment (1940) 49 YALE L. J. 492, 509; Consumers Power Co., H. C. Act Rel. No. 1854 at A-11-12 (discussion by Comm'rs Healy and Mathews).

the parent company's holdings, and because declarant's earnings indicated the equity was more substantial than might appear on the face of the matter, a finding that the parent's holdings represented insufficient equity to support the proposed security structure did not seem warranted;[19] although severe restrictions upon future dividend payments were imposed. The proposed financing would partially correct the parent company's insufficient investment in common stock; by receiving common stock in payment of outstanding notes the parent's equity would involve a more substantial pecuniary investment than formerly. This change, combined with the fact that there would result the substitution of two issues of funded debt for nine, a more rapid rate of debt retirement through more drastic sinking fund requirements, and improved maintenance and replacement requirements, was deemed to justify the issues, notwithstanding the known intercompany appreciation in the property accounts.

How would the proposed transactions affect investors under paragraph (6)?[20] The bonds and debentures were to be better protected in several respects than those outstanding; and there would be a substantial reduction in total fixed charges ranking ahead of preferred dividends, so that the amount of earnings available for them would be correspondingly larger. That the parent and investors in the parent's stock might benefit would certainly be no basis for a finding of detriment to holders of declarant's debt securities. The former company's questionable inadequacy of investment would not warrant an adverse finding, because certain restrictions in the new indenture upon the use of earnings otherwise available for the payment of common dividends would operate as a corrective force.[21] The position of investors would therefore be definitely improved under the refunding operation.

Toward consumers, the Commission's "only concern under the Statute" was whether or not the proposed transactions might have an adverse effect upon them by aggravating any injustices which already existed, or

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[19]It was also held that the proposed transactions were not in violation of the policy of Section 1(b) (1) against issuance of securities "upon the basis of fictitious or unsound asset values having no fair relation to the sums invested in or the earning capacity of the properties and upon the basis of paper profits from intercompany transactions." Of course the earlier transactions referred to would have been impossible if Section 7 had been then applicable.

[20]The United Light and Power Co., H. C. Act Rel. No. 2128 (1940).

[21]The Commission did not think it appropriate at the time to attach voting rights upon default of dividends to the preferred stock or to the proposed debt securities. However, the Commission's power under Section 11 (b) (2) was not diminished by the issues involved, and jurisdiction was "reserved to confer voting power on the bonds, debentures, or outstanding preferred stock to the extent that it may be found appropriate to do so in any proceedings." How far on such an occasion the Commission would go has never been determined.

by making it more difficult to deal with them in the future. If the parent's disproportionately small investment in common stock were injurious to consumers, then it already existed and would not be augmented by the proposed transaction. The increase in declarant's total capitalization, the possibility that consumer interest would be adversely affected by overemphasis upon earning capacity, and the substantial reduction of fixed charges might all enter into future rate questions. Conceivably the Commission's permission to issue the new securities could be cited as creating some obstacle to rate reductions or as affecting the price on condemnation or sale; hence declarant was required to stipulate that no such position would be taken in any proceedings or negotiation with respect to rates or other matters. Declarant's rates were not of course within the Commission's jurisdiction, but it was clearly its job to see that these financing operations would not be detrimental to consumers by "freezing an unconscionable rate structure."[22]

Consequently "foreseeable reductions" in the rate base should be considered, since they might reduce future earnings.[23] Whether or not the Commission has been so overemphasizing earning capacity that consumers have been harmfully affected has not yet been made apparent, but the fact that such a possibility was discussed in the opinion gives this case a broader significance than its mere terminology indicates. Nevertheless, *Public Service Company of Colorado* represents the Commission's policy toward refunding operations. In this instance, the debt ratio would be reduced and the write-ups would be substantially offset by a proper capitalization of reasonably foreseeable earnings. "Half a loaf is better than none," and, similarly, the Commission apparently thought that some improvement in declarant's capital structure was better than none.

Even stronger is the case where a refunding operation implements a progressive reduction of fixed charges. In *Kentucky Utilities Company*[24] declarant proposed to issue certain bonds and notes to refund out-

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[22]This fact was specifically and adequately recognized by Comm'r Eicher's concurring opinion, on pp. 43-46, but not by the majority opinion. Comm'r Healy dissented. See also Central Ill. Elec. and Gas Co., H. C. Act Rel. No. 1592 (1939) at 19 [6 (b) exemption case]; Philadelphia Co., H. C. Act Rel. No. 1905 (1940).

[23]See Chairman Frank in Southwestern Gas and Electric Co., H. C. Act Rel. No. 1931 (1940) at 17, n. 5.

[24]H. C. Act Rel. No. 1959 (1940). Even when an analysis of the security structure and the earning power of the declarant and its holding company indicates that its ratio of debt to assets is high, declarant will be permitted to sell its bonds to pay off a debt for which they are pledged as collateral security. Although the bonds themselves would still have been outstanding, the debt secured could be retired in a transaction which would result in a definite strengthening of declarant's financial structure. Republic Service Corp., 2 S. E. C. 44 (1937).

standing securities and to meet other corporate necessities. The ratios of funded debt to total capitalization and of funded debt to utility assets (gross utility plant) were both around 63 per cent and not altogether satisfactory; but, on the other hand, declarant had a few months earlier in its refunding program retired certain bonds, and, under the terms of the instruments under which the proposed securities were being issued, a gradual reduction of funded debt would commence almost immediately. Accordingly it would be expected that these debt ratios would improve. Considerable savings could be effected under the proposed financing, and indisputably it was "highly desirable" that they—as well as a substantial portion of the company's earnings—"should be devoted to the retirement of debt, which will have the effect of improving the security structure and the ratio of debt to property." Therefore no adverse findings were made under subsections (d) (1) and (d) (2).

Another always important consideration in passing upon either refunding or new-money issues under subsection (d) is whether or not they are to be sold for public distribution.[25] Frequently declarant's ratio of debt to fixed property has been higher than the Commission would consider proper if the bonds were to be sold to the general public; but it is usually held that, where there is "little probability" that the securities will ever be available to the general public, no adverse findings will be made.[26]

Protective provisions for issues of preferred stock may be required by the Commission under the authority of paragraph (6) which permits adverse findings where the terms and conditions are "detrimental to the public interest or the interest of investors."[27] But the SEC has not as yet attempted to provide any minimum standards for preferred stock applicable to all situations; it has limited its requirements to the special circumstances of each case. Hence the North American Company was permitted to issue new cumulative preferred stock without the extensive safeguards advocated by numerous authorities for protection against coercion of the preferred stockholders by the common holders. On the other hand, there was a substantial cushion behind the preferred stock, built up by the omission of cash dividends to the common holders in past years and the payment of such dividends in stock, and there was also the fact that the holders of North American common stock were widely scattered with no large owners, and the fact that the Commission had extensive jurisdiction over the future activities of declarant, combined

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[25]Republic Service Corp. 2 S. E. C. 44 (1937).
[26]The Minneapolis General Electric Co., 2 S. E. C. 57 (1937).
[27]See The North American Co., 4 S. E. C. 434, 460 (1939).

to provide "safeguards" for investors adequate to prevent any adverse findings under paragraph (6).

However, subsection (d) has been used affirmatively in at least one case to facilitate the protection of preferred stockholders from a dilution of their prior participating rights. *Northeastern Water and Electric Corporation,*[28] a subholding company whose top parent was in a court of bankruptcy, sought to purchase with a bank loan the outstanding shares of another company. Since declarant's debt was to be substantially increased, the Commission did not have the relatively simple problem arising in the majority of refunding operations. Moreover, because on a consolidated *pro forma* basis declarant's common stock aggregated but 7.5 per cent of the fixed capital, the common interest represented an extraordinarily thin margin or "cushion" for the public investors in declarant's preferred stock. Hence the Commission had to consider whether the substantial increase of debt would be "detrimental . . . to the interest of investors" within the meaning of paragraph (6) of subsection (d) and would be reasonably adapted to the security structure under paragraph (1). Although the proposed transaction had been approved by the vote of the preferred stockholders, no proposal to restrict dividends on the common stock had been submitted. The disproportionately small common-stock investment definitely afforded potentialities for abuse, which the Commission felt it must regard in considering the availability of funds for the continued payment of dividends on the preferred stock. Accordingly, since declarant's *pro forma* earnings would suffice to meet demands upon it only if no common distribution were made, the Commission approved the transaction, but imposed the condition that no dividends could be paid on the common stock until the proposed debt should be liquidated. The result was that the commission used its authority [under subsection (d)] to protect the investing public (represented by the holders of the outstanding preferred stock) from possible dissipations of the corporate resources.[29]

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[28]H. C. Act Rel. No. 2314 (1940). See in the Appendix to this opinion an excellent account of the genesis and development of the Holding Company Act with particular reference to the restrictions on managerial judgment which were intended to be imposed by the Act. See also S. E. C., Report on the Study and Investigation of the Work, Activities, Personnel and Functions of Protective and Reorganization Committees (1938) pt. VII, pp. 109-197, 464-525.

[29]See Walter H. Pollak, Trustee of A. G. & E. Co., Debtor, In Reorganization under c. 10 of the Bankruptcy Act, H. C. Act Rel. No. 2274 (1940) [where Comm. refused to impose conditions under subsection (d) to an issue of trustee's certificates, although recognizing the power to do so, because of its subsequent powers under Section 11(f) and because of the necessity for judicial authorization of the use of the proceeds].

In the ten years since the market crash, new capital issues of holding company securities have not sold because of their dubious value and the new Federal regulation; on the other hand, operating company common stock (closely held by their parents) could not be bought. Hence the public was rarely offered new money issues, but mostly bonds and preferred stock of operating companies (usually refunding issues at lower rates).

However, the present membership of the SEC admittedly has two basic sociological objectives: (1) to encourage equity financing so that utilities may avoid the bond-burdened fate of the railroads, and (2) to free operating utilities from centralized control and to get their profitable equities into public hands.[30] Chairman Frank has described the first as a sort of "curative medicine" and the second as a type of "preventive medicine."[31] Both are just now in a process of gestation, but the method which will be used in obtaining them is clear: the utility industry should be financed to an increasing extent through the issuance and sale of stock rather than through the sale of bonds. The rationale is this: unless the volume of long-term private debt is decreased and stocks are increasingly substituted, our profit economy will be subjected to a great strain. Nowhere has this been more apparent than in the utility industry. Manifestly it is a financial evil for a corporation to have its permanent fixed capital in such a form that it is under a legal obligation to pay it in large blocs; hence where capital needs can be satisfied reasonably well by common stock financing, this more flexible method of raising funds should be used. To what extent has the Commission fulfilled these objectives?

Any examination of the Commission's current policy of encouraging equity financing in preference to debt financing must begin with the well-publicized *Consumers Power Company Case*.[32] The Consumers Power Company, whose outstanding common stock was wholly owned by the Commonwealth and Southern Corporation, a registered holding company, filed a declaration under Section 7 regarding the issue and sale of $28,594,000 principal amount of thirty-year first mortgage bonds and 125,000

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[30]See (March 11, 1940) 35 TIME No. 11, at 77; FRANK, SAVE AMERICA FIRST (1938) 385, 386; Address of Chairman Landis upon the Holding Company Act, delivered over national radio hook-up, H. C. Act Rel. No. 3 (Sept. 28, 1935). For an interesting and authoritative comment upon the reorganization problem, see Address of J. Anthony Panuch (Special Counsel, Reorganization Division), *The S. E. C. and the Chandler Act*, delivered before N. Y. County Lawyer's Ass'n, Nov. 21, 1939.

[31]See Chairman Frank dissenting in The North American Co., 4 S. E. C. 434, 469, 470 (1939); Address of Chairman Frank, *Corporation Management and the SEC*, delivered before the American Management Ass'n, Jan. 25, 1940.

[32]Consumers Power Co., H. C. Act Rel. No. 1854 (1939).

shares of common stock.[33] A Maine corporation, the Consumers Company did business entirely within the State of Michigan. Its proceeds from the sale of the common stock ($3,524,187.50) were to reimburse its treasury for expenditures. Of the proceeds of the bonds, which were to bear a comparatively low interest rate, $18,594,000 were to refund certain other outstanding bonds, and $10,000,000 were to reimburse declarant's treasury for certain expenditures for net property additions (*i.e.*, to finance new construction). The Commission approved the issue and sale of the common stock and of the $18,594,000 principal amount of refunding bonds.

However, it refused to permit to become effective the declaration as to the issuance and sale of the remaining $10,000,000 of bonds proposed to be used for property additions. Admittedly they came within Section 7 (c) (2) (B) in being for the purpose of financing declarant's business as a public utility company, and it was assumed (without being decided) that they met the standards of Section 7 (d) (1) and (2), but substantial objections within the standards of paragraph (3) of subsection (d) arose to prevent any approval of these bonds. The Commission stated that it would give due weight to managerial judgment as one of the factors to be considered in arriving at the statutory findings, but that it was also its duty to determine whether the exercise of managerial discretion conformed to the applicable standards of the Act. Moreover, the fact that a security met the requirements of subsection (d) (1)—in that it is reasonably adapted to the security structure—or of subsection (d) (2)—in that it is reasonably adapted to the earnings—clearly did not relieve the Commission of its obligation not to permit the issue and sale if, under Section 7 (d) (3), it should find that "financing by the issue and the sale of a particular security" was not "necessary or appropriate to the economical and efficient operation" of applicant's business.

Because declarant's capital needs could be satisfied by the sale at reasonable terms of $10,000,000 of additional common stock instead of that sum in bonds, it was held that new financing through the sale of bonds was not "necessary" for the economical and efficient operation of Consumer's business. The Consumers Company's consistently good earn-

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[33]Commonwealth applied under Section 10 for permission to acquire the common stock, and two underwriters filed an application pursuant to Rule U-12-F-2 for a determination of their status as participating underwriters for the bonds. The problems involved were: (1) Commonwealth's right to acquire the additional common; (2) whether underwriters were "affiliates" within the Act and hence whether there was an absence of arm's-length bargaining (which was reserved for later decision), and (3) whether the underwriter fees were unreasonable (they were held not to be).

ings, its payment of substantial dividends on its common stock, and an offer by an investment firm to purchase at a good price a minimum of $10,000,000 principal amount of additional common stock all indicated that the stock might readily be marketed. However, another finding must also be made in order to bar the new financing under paragraph (3):

> "For . . . if we find that financing is 'not necessary,' we must not permit the declaration in regard thereto to become effective if we also find that proposed financing is 'not appropriate' to the economical and efficient operation of the business involved. However, if we find that the security would satisfy the standards of Section 7 (d) (3) that it be 'necessary *or* appropriate,' we would not reach the question of whether it is 'appropriate.' . . . The word 'appropriate' . . . clearly imposes a standard in addition to the standards of 7 (d) (1), (2), and (6); otherwise its inclusion would be redundant. That additional standard requires that proposed financing be rejected if there are other available alternatives which are clearly better suited to the needs of the corporation. In other words, a security which satisfies the other tests of Section 7 must still be rejected where (1) it is not 'necessary'—*i.e.*, something else is easily available; and (2) it is not 'appropriate'—*i.e.*, something unquestionably *better*, something distinctly more appropriate to efficient and economical operation, is easily available."[34]

Did the latter condition exist? Was there some method distinctly more appropriate than that proposed? The Consumers Company's financial structure consisted of 51 per cent bonds, 29 per cent preferred stock, and 20 per cent common stock and surplus. In fine, its ratio of common stock and surplus to its total capitalization would be *pro forma* but 20 per cent (approximately)—a ratio considerably lower than corresponding ratios in the case of other utility companies operating in the Middle West area. The ratio of the Consumers Company's debt and preferred stock to depreciated property was approximately 89 per cent, leaving 11 per cent of depreciated property for common stock and surplus; and, if the proposed issues were used exclusively for property additions, this ratio to depreciated property would be approximately 86 per cent, leaving a balance of 14 per cent of depreciated property for common stock and surplus—considerably less than the corresponding ratios and balances in the case of other comparable operating utilities. Moreover, if the proposed issues were used entirely for property additions, the ratio of debt to

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[34]Consumers Power Co., H. C. Act Rel. No. 1854 (1930) at 20.

depreciated property would be 56.4 per cent, a percentage higher with one exception than the corresponding percentages of comparable companies.

Another consideration was the possible future need of the utility industry and the possibility of future changes in the Consumers Company's earning power. At a time of financial stress the corporation might be confronted with the necessity of obtaining capital for replacement or expansion to meet maturities, and manifestly financing may be then possible only if declarant has not previously exhausted its credit by the issuance of bonds. Hence it was not "appropriate" for the Company not to take advantage of a favorable market for common stock and thereby conserve its credit. Present financing through additional debt, the Commission thought, might tend to create such a security structure that, when the Commission should deal with future applications of the Company for the issuance of securities, it might have to make an adverse finding under Section 7 (d) (1)—since the future nonavailability of capital would be detrimental to the economical and efficient operation of the Company's business.

The question as to whether the "danger point" in debt financing has been reached was said to arise under paragraph (2) (whether an issue is reasonably adapted to the corporate earning power), but the Commission did not intimate that there was such a situation in the instant case. However, paragraph (3) goes further and prevents conditions (such as a substantial debt increase) which might in the future bring the company into the danger zone.[35] A severe future contraction of sales might so reduce earnings as to prevent payment of preferred dividends, which in turn would naturally reflect upon the credit position of the company. Obviously this possibility would be accentuated by the issuance of bonds with a claim to earnings prior to that of the preferred shares. It was therefore not "necessary or appropriate" for economical and efficient operation for the Consumers Company to raise funds by increasing further its outstanding debt.

Admittedly the interpretation of paragraph (3) in this case limits the scope of the provision. Since there is no direct evidence, there is no profit in speculating upon what the Congress meant by it; whether paragraph (3) was intended only to restrict the purposes of financing operations or to check such operations when they tended toward an unbalanced financial structure is not revealed. The Commission has adopted here the latter

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[35]On pages 26 and 27 of his opinion, Chairman Frank pointed out the analogy of "the present plight of the railroads and their investors." See also Chairman Frank dissenting in The North American Co., 4 S. E. C. 434, 469 (1930).

interpretation in new-money cases—with a definite qualification, however. When it held that if the security is "necessary" within paragraph (3) then it completely satisfies the requisites of that paragraph, it placed a drastic limitation upon its scope. It also raised the question (determinable only upon the facts of each case) of when a bond issue is so "necessary" as to satisfy paragraph (3). In other words, when is equity financing sufficiently unavailable to render debt-financing "necessary"?

No reversal of a prior position is to be observed in the Commission's interpretation in the *Consumers Power Case* of paragraph (3), which had not been used to any extent prior to that time.[36] A security might manifestly be reasonably adapted to declarant's security structure and earning power [paragraphs (1) and (2)] and yet not to be "necessary" or "appropriate" to the operation of applicant's business. Paragraph (3) therefore goes "further" and is applicable in advance of the effect of the former two paragraphs. However, this limitation upon the applicability of paragraph (3) is unfortunate because it restricts the scope of its use. Most utility companies have to refund by the sale of bonds, and when seeking new money can secure it more cheaply through an issue of bonds than of common stock. Therefore, the problem of future policy is again reduced to the question of how liberally the Commission will interpret the word *necessary*. With a flexible interpretation of this term, the Commission will give itself the additional tool of determining whether or not the security is "appropriate" and whether or not there is one "unquestionably better." If this latter question is answered in the negative, and it is desired to insist upon equity financing in the particular operation, then paragraphs (1) and (2) may be relied upon.

Another case in which the Commission permitted its preference for common-stock financing to prohibit under paragraph (3) an issue of securities in their nature debt obligations was *Northern States Power Company*,[37] in which declarant proposed to reclassify its outstanding cumulative preferred into convertible preferred stock to assist its underwriters to dispose of the issue. Because no immediate exercise of conversion rights was imminent, the proposed changes would not bring about any substantial improvement in declarant's financial structure. *A fortiori,* since the Commission thought this unexercised conversion privilege might have an unfavorable effect upon the company's ability to do common-stock financing, it was held that the changes were not "necessary or appropriate

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[36]See Comment (1940) 49 YALE L. J. 750 [in which the Commission is accused of altering its previously expressed explanations of the respective purposes of paragraphs (1), (2), and (3) of Section 7 (d)].

[37]2 S. E. C. 825 (1937).

to the economical or efficient operation of applicant's business" within paragraph (3) of subsection (d).

On the other hand, one type of situation which might justify debt financing in preference to equity issues is when the present low prices of the corporations' stock would result in diluting the share participation and increasing the difficulty of future equity financing. Under paragraphs (1) and (2) of subsection (4) the Commission is able to refuse an issue of an obligation bearing fixed charges if the proportion of fixed obligations to total capitalization is high or if declarant's earning record is unstable. On the other hand, when testing an issue by these paragraphs the Commission has recognized such mitigating circumstances. For example, in *Southern Natural Gas Company*[38] the declarant, a holding and an operating company, sought to issue and sell first mortgage sinking fund bonds. The Commission felt that "a more ideal way of financing would be by the sale of additional equity securities." The ratio of long time debt to common stock appeared disproportionate—75 to 25 per cent—and the new securities would rank senior to the others. However, other considerations were more favorable: there was an adequate earning coverage, the ratio of funded debt to mortgaged property was only 68 per cent, and, at present low prices, new equity financing would have resulted in a substantial dilution of the aliquot interests of the stockholders, and would have tended to make future equity financing more difficult when better prices could be obtained. The Commission therefore refused to make any findings that the securities were not reasonably adapted to declarant's security structure [paragraph (1)] or that the terms and conditions of the issuance were detrimental to the public interest or the interest of investors or consumers [paragraph (6)].[39] Future market prospects justified the result.

Moreover, the generality of the terms in subsection (d) lends itself to a broad supervision of many varying elements of a security issue which would otherwise be beyond the Commission's jurisdiction. In *Northern States Power Company*[40] declarant proposed to issue unsecured notes in accordance with a bank-credit agreement which included a stand-by agreement. The proceeds were to pay for certain construction costs for additions to properties of declarant and its subsidiaries. Two substantial ques-

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[38] 2 S. E. C. 927 (1937); Wisconsin Michigan Power Co., 2 S. E. C. 933 (1937).

[39] An important safeguard under the terms of the indenture provided that the proceeds were to be used for capital additions. Moreover, a disbursement out of cash income to the extent of 40 per cent of the total expenditure made was required to be made. Southern Natural Gas Co., 2 S. E. C. 927, 929 (1937).

[40] 2 S. E. C. 936 (1937).

tions arose. The Commission debated whether or not it was appropriate under paragraph (3) for declarant to resort to short-term bank credit to meet requirements for permanent capital. The only method of permanent financing which was then available to the declarant on favorable terms was the sale of first-mortgage bonds; on the other hand, declarant hoped to be able to sell equity securities at or before the maturity of these notes at better prices than were then prevailing and to use the proceeds to refund the proposed bank loans. This procedure would undoubtedly result in a better balanced capital structure than any sale of long-term bonds. Referring to the judgment of declarant's management upon the timing of capital issues, the Commission agreed to the instant proposal. In addition, it was questioned whether the proposed stand-by agreement was an appropriate method of obtaining bank credit within the standards of paragraphs (1) and (3). Although the desirability of entering into a stand-by agreement is more or less a matter of discretionary judgment, the Commission observed that, in inquiring into the reasonableness of the total costs of any proposed issuance of securities, it "must be satisfied that the aggregate cost of borrowing such sums as may be actually obtained is not out of line with the cost of money available by other methods." Carefully scrutinizing the instant arrangement, it held that the relatively short period covered by the stand-by agreement and declarant's specific construction plans rendered it improbable that the net cost of such funds as would be actually borrowed would be unreasonable. Here again the Commission made an exception to its rule regarding new-money issues in order ultimately to secure a better-balanced capital structure.

The first electric utility to float new-money common stock since 1932 was the Indianapolis Power and Light Company, which issued preferred and no-par common stocks under a 6 (b) exemption.[41] Because the standards of subsection (d) were not applicable, no important question of Commission policy arose in this case. However, a short time later the West Penn. Power Company[42] sought to raise new-money under Section 7 by issuing $3,500,000 of first mortgage bonds and 160,000 shares of no-par common stock, whose proceeds were to be used for constructing addi-

[41]Charles True Adams, Trustee of the Estate of U. P. & L. Corps., Indianapolis Power & Light Corp., H. C. Act Rel. No. 2001 (1940); see (April 15, 1940) 35 TIME No. 16 at 82. Floyd Odlum's Atlas Corp. bought 64 per cent of bankrupt U. P. & L.'s outstanding bonds, and therefore acquired control of Indianapolis. Indianapolis' common was more than two times oversubscribed in less than two hours at $24 a share (having yielded 16 2/3 per cent in 1939). Atlas thereby liquidated $10,000,000 frozen in U. P. & L. Similarly, the public bought freely the later West Penn. issue. H. C. Act Rel. No. 2009 (1940). See (April 22, 1940) 35 TIME, No. 17, at 84. See Washington Gas Light Co., H. C. Act. Rel. No. 1670 (1939) [6(b) new-money issue].

[42]H. C. Act Rel. No. 2009 (1940); see (April 26, 1940) 35 TIME No. 17.

tions to its property. Because they were to be secured by a first lien on declarant's physical property, the bonds qualified under Section 7 (c) (1) (B); and, because it was to be issued to finance declarant's business as a public utility company, the common stock fell within Section 7 (c) (2) (B).

The difficulty arose when these issues were tested by the standards of subsection (d). There were several factors which gave rise to speculation. Certain inflationary items (the result of various acquisitions of subsidiaries) existed in declarant's property account and in its investment account, and the sale of the proposed common stock would result in "fattening" the outstanding common, since the price was substantially higher on a time earnings basis than any other comparable stocks: 16 times its 1939 earnings.[43] In addition, a rate proceeding already instituted by the Pennsylvania Public Service Commission might in the future result in a substantial rate reduction.

But West Penn. admittedly needed funds for plant expansion. Since its holding company was in no position to make such a contribution,[44] West Penn. was compelled to raise the necessary cash by a public offering. Several methods were available: an issuance of first mortgage bonds, of preferred stock, of common stock, or a combination of two or three of these securities. However, because there was a comparatively small common stock equity, the Commission thought that a financing program consisting entirely of senior debt securities would fall short of the statutory requirements of 7 (d). Under declarant's instant proposal more than half of its capital requirements were to be raised through the issuance of common stock; hence no adverse findings were made under Section 7 (d)

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[43]On the other hand, using in place of 1939 figures a five-year average of earnings from 1935 through 1939, all but two of the seven stocks compared had a ratio of current price per share earnings in excess of that of the proposed price for the West Penn. stock. West Penn. Power Co., at 13. Other possible speculative factors were: the company's depreciation requirements might be increased under the system of depreciation accounting as required by the Uniform System of Accounts of the Federal Power Commission, and either the FPC or the Pennsylvania Commission might direct that a $12,000,000 excess of book value of property over the original cost therefore be amortized, which would have no effect on earnings and dividends.

[44]And this in spite of the fact that the American Water Works holding-company system had been declared by the Commission to meet the standards of physical integration of Section 11 (b) (1). American Water 11 (e) plan was approved in 2 S. E. C. 972 (1937). In the principal opinion, the Commission commented, on page 14, that this "demonstrates that the complex problems involved in the regulation of holding companies are not solved, even though the system as a whole meets the physical integration requirements of the Holding Company Act." The obvious reply to this statement is that of course meeting an arbitrary geographical standard does not *per se* render a holding company economically sound. A minor premise is not coextensive with the conclusion.

(1), (3), or (6). Investors in the common stock would be adequately protected by what the Commission generally considers the controlling factor in this sort of case: a reasonable prospect of adequate earnings. Future possible reductions in rates did not promise to be so extensive as to lead to severe inroads upon future earnings available to the common stock. The sale of this stock was considered to further the purpose of Congress: its "cushion" would be beneficial to the public interest and to the interest of the holders of the company's publicly-held bonds and preferred stocks, and it would aid in the "economical and efficient operation" of the declarant's business by avoiding the rigidities of a kind which have contributed largely to the present serious plight of the railroads. This flotation, reflecting 1940's major change in utility financing, raised the common stock share of West Penn.'s capital from 22.9 per cent to 24.6 per cent, and in line with the Commission's policy it serves as a beginning by giving the public a 5.5 per cent minority interest in the largest subsidiary of the American Water Works and Electric Company System.

The Commission has consistently followed the policy of keeping down utilities' debts and preventing them from over-bonding themselves. Hence it is said that "generally speaking, a proposal to substitute debt money for equity money cannot be entertained without misgivings, much less approved," but occasionally there are distinguishing circumstances. In short, an exception to this policy has been recognized. Such a factual situation arose in *Ogden Corporation,*[45] in which declarant was successor to the bankrupt Utilities Power and Light Corporation system and liquidating holder of the U. P. and L. leftovers. Ogden proposed to issue a 2½ per cent bank-loan note, and to redeem its outstanding preferred. Atlas Corporation, owning 76 per cent of Ogden's common and 68 per cent of its preferred, was the motivating force and would naturally receive most of the bank loan. The Commission based its approving opinion upon the facts that Ogden was manifestly a medium of liquidation, that the bank loan would save $110,000 a year, and that it was collaterized over three times. An unexpressed consideration was no doubt the fact that declarant's holding company has been one of the major ones cooperating with the SEC under the Section 11 simplification provisions. Of course, from a practical viewpoint the transaction was largely bookkeeping for Ogden's holding company and banker, Atlas Corporation. In fine, the case illustrates the sort of unusual situation in which a departure from the standards of subsection (d) is justified: where there will be a substantial bene-

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[45]H. C. Act Rel. No. 2153 (1930); (July 15, 1940) 36 TIME No. 3, at 63; Utilities Power and Light Corp., H. C. Act Rel. No. 1655, 1655-A (1939); Charles True Adams, Trustee Newport Electric Corp., 4 S. E. C. 999 (1939).

fit under the reorganization and simplification objectives for holding company systems. Certainly the proposed note was not reasonably adapted to declarant's security structure or its earning power. Commissioner Eicher, in a vigorous dissenting opinion, protested that the transaction was simply the incurring of debt in order to retire preferred stock. Nevertheless, in holding that subsection (d)'s requirements do not apply to a liquidating corporation the Commission pointed out various distinguishing facts, which were primarily declarant's strong cash position, the strong asset coverage, the savings to the common stock, and the return of the money to the preferred stockholders. The result was definitely in harmony with the general plan of putting the money into the hands of Ogden security holders as quickly as possible.

Subsection (d) is, in fine, the tool with which the Commission is molding its policy toward the several kinds of refunding and new-money security issues of utility holding companies and their subsidiaries, and, as a result of the SEC decisions to date, some animadversions may be ventured. Although under the terms of the Act the same standards are applicable to refunding issues as to new-money issues, as a practical matter the pertinent standards in cases of the former type have been applied with relative liberality, whereas in the latter the Commission has insisted upon equity financing unless very good reasons justify a departure from that method.

The possibility that present low prices of a declarant's stock might result in a dilution of the stockholders' aliquot interests and would tend to make future common-stock operations more difficult, the fact that a liquidating corporation can operate more cheaply with debt security, and the existence of a reasonable doubt over the actual timing of an equity issue have all been deemed sufficient to justify new issues of debt obligations in preference to equity participations. If the proportion of declarant's fixed obligations to total capitalization is high or if its earning record is unstable, the Commission will consider with caution any issue. Conversely, the standards of subsection (d) are relaxed when the securities are not to be sold to the general public. The tests of subsection (d), moreover, are being used along with conditional orders to limit, in cases of new debt financing, the danger of common dividends diluting the capital "cushion" of the preferred stock. On the other hand, increases in the total capitalization of operating companies and, in a few cases, an overemphasis by the Commission upon earning capacity represent possible sources of future harm to the consumer by freezing an unduly high rate structure.

Although too frequent changes in membership have retarded the development of any consistent interpretation of the policy-making subsection (d), many of the important aspects of the Commission's regulatory ideas have been discussed in its decisions. The failure to specifically delimit the several paragraphs of subsection (d) has caused some criticism, and the interpretation of paragraph (3) in the *Consumers Power Case* may be considered a reversal of its usual and logical desire for flexibility. However, the Commission has on the whole retained for itself considerable latitude in developing its policy, which has as its present major purpose a determination to decentralize control and to alleviate over-capitalized utility and holding-company structures by insisting upon common-stock financing in new-money issues. Attaining only a slow momentum within the past few months, this policy may well be the precursor of future capital structures in a reorganized utility industry.

THE HEADSTONE OF THE CORNER: THE FEDERAL BILL OF RIGHTS*

Walter P. Armstrong†

In my opinion the most fascinating current constitutional development is around the Bill of Rights. I am persuaded that in the future the Bill of Rights will acquire a practical importance not foreseen by our early statesmen.

I shall attempt to point out why I believe this to be true. In order for me to do this it will be necessary briefly to review the history of the Bill of Rights. This survey does not purport to uncover any new facts. It is a restatement of accepted history. It is merely preliminary to the thought I desire to leave with you. I am only refreshing your recollection as to facts already well known to you all. This I do because I wish you to have these things in mind when I suggest the reasons for the increasing importance of the Bill of Rights.

By the national Bill of Rights we mean, of course, the first ten amendments to the Federal Constitution.

These amendments are restrictions upon the power of the Federal Government alone and not upon that of the states. Briefly stated, they guarantee *against any interference by the nation,* freedom of religion, of speech and of the press. They recognize the right of the people peaceably to assemble and petition for a redress of grievances. The right to bear arms must not be infringed upon. In time of peace soldiers must not be quartered in any house without the consent of the owner "nor in time of war, but in a manner to be prescribed by law." Security is provided for the people "in their persons, houses, papers, and effects against unreasonable searches and seizures."

Accused persons are guaranteed certain common law rights: indictment by a grand jury, immunity against double jeopardy and against being compelled to testify against themselves. Trials are to be by a jury of the district in which the crime was committed. The accused must be confronted with the witnesses against him and is entitled to compul-

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*An address before the University of Mississippi School of Law, November, 1940. The introductory remarks are omitted. Tribute was paid therein to L. Q. C. Lamar, distinguished lawyer and educator, who was at one time a Professor of Law at the University, and for whom the University of Law Building is named.

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sory process to enforce the attendance of his own witnesses and to the assistance of counsel. Excessive bail, excessive fines, cruel and unusual punishment are prohibited. All are accorded due process of law "nor shall private property be taken for public use without just compensation." The right to jury trials in common law suits where the amount involved exceeds twenty dollars is preserved.[1]

That there might be no possible doubt that the Federal Government was one of delegated powers only the last two amendments provided that "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people" and that "The powers not delegated to the United States nor prohibited to the States, are reserved to the States respectively or to the people."

Not only was this Bill of Rights not included in the Constitution as adopted by the Convention, but no Bill of Rights was included. Moreover, a proposal to include one was unanimously rejected by the Founding Fathers.[2]

The reason for this action is not only intrinsically interesting but gives point to what I shall say about the ever-increasing importance in our time of the Bill of Rights.

At the time of the Constitutional Convention the conception of a Bill of Rights was not new in America. It had been a familiar idea since the English Declaration of Rights of 1689 which followed the tyrannies of the Second Charles and the Second James. Presented by Parliament to William and Mary and accepted by them it had become one of the charters of English liberty. Moreover, prior to the Convention, eight states, led by Virginia, had embodied Bills of Rights in their constitutions.[3]

The members of the Convention, however, failed to see the necessity or even the desirability of a Bill of Rights in the new Federal Constitution. Some were imbued with the English common-law idea of government according to which individual rights are inborn and inalienable. This is today the underlying idea of the governments of Great Britain, the United States and the self-governing British Commonwealths. To these rights already possessed a Constitution can give only added protection.

Contrasted with this was the idea then and now prevalent in many countries of Continental Europe that the state possesses all power and the

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[1]U. S. Const. Amends. I to X.

[2]2 Farrand, The Records of the Federal Constitution of 1787 (1937) 588. See also Farrand, The Framing of the Constitution (1913) 185-186.

[3]Warren, Congress, the Constitution, and the Supreme Court (2nd ed. 1935) 36.

individual no rights except such as the state sees fit to grant. Holding the English and not the European view of government many saw no need of giving to themselves rights which undoubtedly they already possessed. This feeling was strengthened by their conception of the new Federal Government. It was to be a government of delegated powers and it was difficult for them to foresee how it could claim the power to legislate about most of the subjects which would naturally fall within the scope of a Bill of Rights. They did not vizualize John Marshall and the doctrine of inherent and implied powers.

In the *Federalist* Alexander Hamilton wrote:

> " 'We the people of the United States . . . ' This is a better recognition of popular rights than volumes of those aphorisms which make the principal figure in several of our State bills of rights, and which would sound much better in a treatise of ethics than in a constitution of government. . . . The truth is, after all the declamation we have heard, that the Constitution is itself, in every rational sense, and to every useful purpose, A BILL OF RIGHTS."[4]

Thomas Jefferson felt differently. On the day that Massachusetts voted in favor of ratification of the Constitution he wrote from Paris to Madison:

> "I wish with all my soul that the nine first conventions may accept the new Constitution, to secure to us the good it contains; but I equally wish that the four latest, whichever they may be, may refuse to accede to it till a declaration of rights be annexed."[5]

Popular opinion coincided with that of Jefferson. The Conventions of Pennsylvania, Massachusetts and Virginia were especially concerned about the absence of a Bill of Rights. Those of Massachusetts and Virginia were only induced to vote for ratification by assurances that the states' representatives would be instructed to vote for amendments which should constitute a bill of rights.

It was in accordance with this understanding that James Madison, as soon as the First Congress met, introduced amendments embodying a Bill of Rights. In drafting them he had recourse to the constitutions of the states, especially to that of Virginia. Of the twelve proposed, ten were adopted and for all practical purposes became a part of the original Constitution.

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[4]HAMILTON, THE FEDERALIST (1885) No. 84, p. 630.

[5]FARRAND, THE FATHERS OF THE CONSTITUTION (1921) 152. Jefferson wrote copiously and consistently expressing this view; see his reprinted letters in FOLEY, JEFFERSON ENCYCLOPEDIA 88-91.

Subsequent events have vindicated Jefferson's position rather than that of Hamilton. In this connection it may not be uninteresting to recall the views of a great Mississippian on this subject. John Sharp Williams, of all public men of my time, had the closest intellectual affinity with Thomas Jefferson. In 1912 Senator Williams, as he then was, delivered a series of lectures at Columbia University on Thomas Jefferson. Comparing the views of Jefferson and Hamilton, he said:

> "Now the chief business of a bill of rights is to protect the individual against unjust governmental action. The authors of the *Federalist* do not seem to have realized very intensely the importance of that, "and yet, in so far as the judiciary has found in the Constitution a bulwark of protection for the people against the despotism of Government, or of popular majorities, as in the case of the civil rights bill and some other Reconstruction legislation, and many other enactments violative of national, or property, or labor rights, this bulwark has consisted mainly in the amendments secured by Jefferson and others of his school, and not in the original instrument as presented for adoption in the first instance."

And again,

> "The fact that we still hear so much about the 'inherent powers' of the federal government, even after the adoption of the amendment declaring that 'powers not delegated are reserved to the States, or to the people,' proves that the author of Number 84 of the *Federalist* was wrong and Jefferson right."[6]

Senator Williams would have had no reason to withdraw this statement had he lived to witness the events of the twenty-eight years that have elapsed since he made it.

All this is merely a part of the background I wish you to have in mind when I attempt to indicate the present and adumbrate the future importance of the Bill of Rights.

A convenient division point between the past and the present and future is the beginning of the first term of President Franklin D. Roosevelt.

Before starting forward from that point I wish to add to the background a rapid survey of some of the prior decisions of the Supreme Court

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[6]Williams, Thomas Jefferson: His Permanent Influence on American Institutions (1912) 162 *et seq.*

which struck down Congressional legislation as repugnant to the Bill of Rights.

That in the early days the Court was not more frequently called upon to void Congressional legislation as violative of the Bill of Rights is not surprising. As greatly as Marshall and his Court expanded the power of the Federal Government under the doctrine of inherent and implied powers the great cases of that day were concerned with the question of whether Congress had the power to legislate at all upon the particular subject, not with the question of whether, granted the power to legislate, the legislation had gone so far that it must be stayed by the "Thus far and no further" injunction of the Bill of Rights. A homely illustration will point this truth. A reservoir is projected on waste lands. A dam is constructed whose eventual function is to protect homes and farms from the force of the gathered waters. Not until the water has collected in sufficient volume to exert pressure on the dam can its strength be tested. The granted and implied Federal powers are the water, the Bill of Rights the dam. The waters have gradually flowed in. The reservoir is now almost full. Only now has the testing time of the dam come.

But in the early days before the waters had even covered the surface of the land dedicated to submersion there came a sudden torrent which threatened to test the strength of the dam. This was the Sedition Act of 1798. War with France seemed inevitable. The Federalists, irritated by the unrestrained attacks of journalists and pamphlateers, enacted a law which, among other provisions, provided punishment for any one publishing scandalous and malicious writings against the Government, Congress or the President with intent to defame them or to bring them "into contempt or disrepute."

The Anti-Federalists raged, charging that the act violated the guarantees of freedom of speech and the press found in the first amendment.

There were a few prosecutions in the lower Federal courts under the act, but its constitutionality was never passed upon by the Supreme Court and it expired by its own terms in 1801.[7] The decisions of the Court throw no light upon this question until we come to its opinions dealing with the Espionage Act of 1917 in connection with which Justice Holmes uttered his famous dictum: "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."[8]

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[7]McLaughlin, A Constitutional History of the United States (1935) 264 *et seq.*

[8]Schenck v. United States, 249 U. S. 47, 63 L.ed. 470 (1919).

Thus the Sedition Act passed into history not as the text of a great constitutional decision, but as the occasion for the Anti-Federalists maneuvering themselves into the position of asserting the power of the Courts to invalidate acts of Congress. They were not content to stop there but went further and in the Virginia and Kentucky resolutions declared that each state had the right to decide for itself when an Act of Congress was unconstitutional, a doctrine that was pregnant with future consequences.

One case[9] which grew out of the War Between the States was decided by the full Court and this decision had a measurable effect upon the course of the nation's history.

Lambdin P. Milligan was tried before a Military Commission in Indiana on what amounted to a charge of treason and was sentenced to death.

He sought his discharge by *habeas corpus,* challenging the jurisdiction of the tribunal that tried him, alleging that the civil courts were open in Indiana at the time of his trial, that the Military Commission was not created by Act of Congress, and that Congress could not in defiance of the Bill of Rights authorize trial by a military tribunal in a state which was not in the theatre of war.

The Court was unanimous in holding that he was entitled to his discharge, all agreeing that under the circumstances there could be no trial by a military court unless expressly sanctioned by Act of Congress, and that in this case there was no such act.

A majority of the Court, speaking through Justice David Davis, Lincoln's close friend and appointee, went further and held that Congress could not by legislation authorize such a trial. As to the amendments constituting the Bill of Rights the Court said:

> "And so strong was the sense of the country of their importance, and so jealous were the people, that these rights, highly prized, might be denied them by implication that when the original constitution was proposed for adoption it encountered severe opposition, and, but for the belief that it would be so amended as to embrace them, it would never have been ratified."[10]

The Court repudiated the suggestion that any of the guarantees of the Bill of Rights was suspended by an emergency:

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[9]*Ex parte* Milligan, 4 Wall. 2, 18 L.ed. 281 (U. S. 1866).
[10]*Id.* at 120, 18 L.ed. at 295.

> "The Constitution of the United States is a law for rulers and people, equally in war and in peace. . . . No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism."[11]

It was, therefore, held that Congress would have been powerless to deprive Milligan of his right to grand jury indictment and trial by a petit jury.

It was, of course, unnecessary for the Court to consider this question. The Court was of the unanimous opinion that there was no act of Congress constituting the Military Commission and that for that reason Milligan must be discharged. All else was moot and it was unfortunate that anything more was dealt with.

A minority of the Court, in an opinion written by Chief Justice Chase, while agreeing that Congress had not acted in this case, argued that it had the power to provide for a military trial under such circumstances, basing its argument upon the power of Congress to declare and carry on war. This was held to extend "to all legislation essential to the prosecution of war with vigor and success."

> "What we do maintain is, that when the nation is involved in war, and some portions of the country are invaded and all are exposed to invasion, it is within the power of Congress to determine to what States or districts such great and imminent public danger exists as justifies the authorization of military tribunals for the trial of crimes and offenses against the discipline or security of the army or against the public safety."[12]

We are today engaged in raising a great citizen army. If in the event of war fifth columnists should attempt to tamper with the morale of that army, would the punishment of these traitors have to be left to the civil courts, or could Congress provide that they should be summarily dealt with by the military authorities? I do not know the answer. I do know that recent history has taught us that during war under present-day conditions the home front must be as firmly controlled as any other. Also I venture to think that if the question is ever again presented to the Court, some of the justices at least will indulge in a regret that Chief Justice Chase's Court did not confine itself to the question necessary for a decision.

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[11] *Ibid.*
[12] *Id.* at 140, 18 L.ed. at 302.

The *Milligan* case caused a tremendous sensation. If the majority opinion was sound, the military tribunal that tried and sentenced those alleged to have conspired to assassinate Lincoln was without jurisdiction and the executions that had taken place as a result were nothing more than glorified lynchings. The fury of the attacks on the Court was comparable to that which followed the decision of the *Dred Scott* case.[13] This was heightened by the decision of the Court in Ex parte *Garland*.[14] In that case the Court held that an act of Congress requiring attorneys seeking to practice in federal courts to take an oath that they had not voluntarily given encouragement to those engaged in armed hostility to the United States was unconstitutional because it violated Article I, Section 9 of the Constitution prohibiting bills of attainder and *ex post facto* laws.

Proposals were made to impeach the judges, to increase the membership of the Court and to take away the appellate jurisdiction.

The last suggestion bore fruit.

McCardle, a Mississippi editor, who had been arrested and held for trial by a military commission, appealed to the Supreme Court from a decision of the Federal Circuit in Mississippi, refusing to release him on a writ of *habeas corpus*. After the case[15] was argued and submitted, Congress passed and repassed, over President Johnson's veto, an act depriving the Court of appellate jurisdiction in this class of cases; and no decision was ever rendered.

Another case also arose in Mississippi which seemed likely to apply the test of the Bill of Rights to the Reconstruction Acts. Another editor, Edward M. Yerger, who had been imprisoned by the military, sought to obtain his release by asserting the protection of the Bill of Rights. The Supreme Court took jurisdiction,[16] but before any decision was necessary an agreement was reached and the case became moot.

Thus it was that the Reconstruction Acts escaped the test of the Bill of Rights. It is a sorry chapter in our national history. But its interest is not entirely historical. It stands as a warning of the difficulty of invoking the protection of the Bill of Rights when passions are still inflamed by war.

From the end of Reconstruction to the beginning of the first Roosevelt administration there are no great cases in which the Bill of Rights was

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[13]Dred Scott v. Sandford, 19 How. 393, 15 L.ed. 691 (U. S. 1857).
[14]*Ex parte* Garland, 4 Wall. 333, 18 L.ed. 366 (U. S. 1867).
[15]*Ex parte* McCardle, 6 Wall. 318, 18 L.ed. 816 (U. S. 1868), the decision upholding jurisdiction.
[16]*Ex parte* Yerger, 8 Wall. 85, 19 L.ed. 332 (U. S. 1869).

successfully invoked. There are, however, some which, if they are permitted to stand, may take on a greater significance in the future. One of these[17] involves the constitutionality of an act that antedated Reconstruction, having been enacted during the War Between the States.

The statute involved gave to any federal officer who was sued in a state court and justified his conduct under federal authority, the right to remove the case after judgment to the federal court for trial *de novo*. A United States marshal and his deputy were sued in a state court in New York state for assault and battery and false imprisonment. They defended on the ground that the action taken was pursuant to an order of the President. There was a jury trial resulting in a verdict and judgment for the plaintiff. The defendants attempted to remove the case to the federal court for a new trial on the facts. The Supreme Court held that the statute which purported to accord this right was in violation of that clause of the Seventh Amendment which provides that "no fact tried by a jury shall be otherwise re-examined in any Court of the United States than according to the rules of common law."[18]

The court rejected the argument that this clause only protected jury trials in the lower federal courts and held that it made equally conclusive on the facts verdicts obtained in state courts though a federal question was involved.

In another case[19] the attempt was made to condemn a shipment of plate glass on the ground that it was imported in violation of the custom laws. Under statutory authority the defendant was requested to produce his private papers and these were placed in evidence against him. This was held violative of both the prohibition of the Fourth Amendment against "unreasonable search and seizure" and the prohibition of the Fifth that no man should be compelled in a criminal case to be a witness against himself.

The Court approved the opinion of Lord Camden delivered in 1765 in *Entick v. Carrington*[20] and characterized it as one of the permanent monuments of the British Constitution and as one of the landmarks of English liberty. The Court thought that the framers of the Fourth Amendment had this opinion in mind "as furnishing the true criteria of the reasonable and unreasonable character of such seizures" and said:

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[17]Justices of Supreme Court of N. Y. v. United States, 9 Wall. 274, 19 L.ed. 658 (U. S. 1870).
[18]*Ibid.*
[19]Boyd v. United States, 116 U. S. 616, 29 L.ed. 746 (1886).
[20]19 How. St. Tr. 1029 (1765).

> "They never would have approved of them. The struggles against arbitrary power, in which they had been engaged for more than twenty years, would have been too deeply engraved in their memories to allow them to approve of such insidious disguises of the old grievance which they so deeply abhorred."[21]

The significance of this case has not escaped those who are concerned with and about the inquisitional powers of present-day administrative agencies.

In a third case[22] the Court went further. A witness before a grand jury declined to answer questions "on the ground that his answer might tend to incriminate him." In an effort to punish the witness for contempt the insistence was made that he could not claim the protection of the Fourth and Fifth Amendments because of a statute providing that such evidence could not be used against the witness in any proceeding for a crime or penalty. The Court held that the statute did not have the effect claimed because "it could not and would not prevent the use of his testimony to search out other testimony to be used against him or his property" and added that "in view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the case relates."

On the ground that "the accused shall be confronted with the witnesses against him" a statute was stricken down which permitted a judgment of conviction against a thief to be admitted in a prosecution of a receiver as evidence that the property was stolen.[23]

It was held that while Congress has plenary power to exclude and deport aliens they can only be convicted and punished for crimes when tried by a jury in compliance with the Fourth and Fifth Amendments.[24] The importance of this decision in the light of present day conditions will not escape you.

The last decision to which I shall refer in this connection is one holding that when private property is taken for public use the "just compensation" provided for in the Fifth Amendment means that "the measure of compensation . . . is a judicial and not a legislative question" and that "it does not rest with . . . Congress to say what compensation shall be paid, or even what shall be the rule of compensation. The Constitution has

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[21]Boyd v. United States, 116 U. S. 616, 630, 29 L.ed. 746, 751 (1886).
[22]Counselman v. Hitchcock, 142 U. S. 547, 35 L.ed. 1110 (1892).
[23]Kirby v. United States, 174 U. S. 47, 43 L.ed. 890 (1899).
[24]Wing Wong v. United States, 163 U. S. 228, 41 L.ed. 140 (1896).

declared that just compensation shall be paid and the ascertainment of that is a judicial inquiry."[25]

In this connection the Court declared that the Bill of Rights was adopted lest the government "assume, and might be held to possess the power to trespass upon those rights of persons or property which by the Declaration of Independence were declared to be inalienable rights."

Need I emphasize the importance of this decision in our time when public works are demanding the surrender of so much private property and when the government in carrying forward its defense program is authorized, under certain circumstances, to commandeer entire manufacturing plants?

I have referred sketchily to some, not all, of the cases in which the Bill of Rights was successfully appealed to during the period under consideration.

So much for the earlier decisions. The dam had not been really tested by the rapidly increasing waters of Federal power. However it had stood firm against the spate of war legislation. The judges remembered the Declaration of Independence and that it was its author who demanded that its spirit be embodied in a Bill of Rights. Even the Congress had not entirely forgotten and the task of the court was comparatively easy.

Came 1932.

It is unnecessary to review in detail the legislative and judicial history since that time. Congress has tapped new springs of federal power and their waters have been turned into the reservoir until it is almost full. The testing time of the dam has come.

The best discussion I have heard or read of this vast increase in Federal power was by Frank J. Hogan, of Washington, in his annual address[26] as president of the American Bar Association delivered at San Francisco in 1939.

I do not agree with some of Mr. Hogan's conclusions, but his recital of what has occurred is accurate. Mr. Hogan entitled his address "Important Shifts in Constitutional Doctrine" in allusion to the statement of Mr. Justice Frankfurter in one of his concurring opinions that important shifts in constitutional doctrine were announced after a reconstruction in the membership of the Court.

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[25]Monongahela Navigation Co. v. United States, 148 U. S. 312, 37 L.ed. 463 (1893).

[26]Hogan, *Important Shifts in Constitutional Doctrine* (1939) 64 A. B. A. Rep. 478.

Documenting his remarks by citing the leading cases, Mr. Hogan pointed out that the new Court had "turned aside from what had long been looked upon as 'established' principles of constitutional law which . . . had been 'settled by repeated decisions of this court'" and that "as one member of the Court put it, there took place 'a reversal of a long current of decisions.'" This he characterized as "the most devastating destruction of constitutional limitations upon Federal power, and the most unprecedented expansion of that power over the every day affairs of individual citizens witnessed in the century and a half of the existence of the United States."

He particularized by pointing out how former decisions had been overruled by permitting the Federal Government to tax the incomes of its judges and of state officials. He showed how old opinions had been jettisoned when the interstate commerce clause was held to permit the regulation of agriculture and manufacturing, especially in cases involving labor laws.

He added, "The outstanding point is that by recent judicial construction the power to regulate interstate commerce has brought within the ambit of Federal control most if not all activities of the Nation."

Mr. Hogan could not foresee any reversal of this trend. In fact it has been accentuated as is evidenced by the opinions of the Court delivered during the single term that has elapsed since he spoke.[27]

Nor is there likely to be any change in the future. From the beginning the stars in their courses have fought for an increase in the power of the nation. Now that we are becoming more and more a homogeneous and nationally conscious people it is unlikely that it will be held that there is ever a lack of national power sufficient to deal with a problem that affects the nation as a whole. Five of the nine members of the Court took their seats during the Roosevelt administrations. They are all comparatively young men and seem destined for a long judicial life. These five and at least one other member of the Court have evinced their sympathy with the objectives of the present type of federal legislation. Again, even if there should be a change in the political complexion of the executive and legislative branches of the government we must not forget that history teaches that ordinarily it is the party in control which clamors for an increase in federal power. The new driver may want to turn on to a new road, but he will not want to change a magnificently motored machine for an inferior model.

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[27] *Cf.* Humes, *Trend of Decisions Respecting the Power of Congress to Regulate Interstate Commerce* (1940) 26 A. B. A. J. 846; Albertsworth, *The New Constitutionalism* (1940) 26 A. B. A. J. 865.

I agree then with Mr. Hogan that it is unlikely that in the penetrable future any measurable amount of major legislation that Congress may enact will be invalidated on the ground that it is without the scope of federal power. Granted the power to legislate, the question remains: How far can that legislation go? The answer to that question must be found in the Court's attitude toward the first ten amendments. This it is that today gives an unprecedented importance to the Bill of Rights.

Mr. Hogan did not discuss this question, though he showed his awareness of its importance, for he said:

> "Our Federal and State judiciaries still vigilantly uphold freedom of speech, press and worship; the right of peaceable assembly; the right to have one's home treated as his castle; the right to be free from unreasonable searches and seizures; the right to trial by jury when life, liberty or property is involved; to be represented by counsel, to have personal liberty guarded in those vital respects that are so dear to a society of freeborn men. This indeed is reassuring.
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> "But may there not arise fear that with a steadily growing disposition to adapt the law to changing social and economic conditions these barriers erected by wisdom, gathered from experience, may next be weakened or destroyed? Can a government which may arbitrarily control the individual's economic freedom be relied on permanently to keep safe his civil and political liberties?"[28]

Mr. Hogan does not answer his questions other than to intimate that his view is that the answer is in the negative.

The questions posed are of transcendent importance and I shall attempt at least to suggest the probable answer.

In discussing some of the leading cases dealing with so-called "New Deal" legislation I shall roughly classify them as dealing (1) with tangible property rights (2) with procedural due process (3) with matters affecting the safety and unity of the nation and (4) with personal liberty such as free speech, freedom of the press, of religion and assembly.

In 1935 the Court held violative of the Fifth Amendment the Railroad Retirement Act on the ground, among others, that it treated all carriers as a single employer and thus placed upon solvent carriers the burden

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[28]Hogan, *Important Shifts in Constitutional Doctrine* (1939) 64 A. B. A. Rep. 478, 499.

of the insolvent and upon operating carriers the burden of those that had ceased operation.[29]

There were only four members of the present Court who were then members—the Chief Justice, Mr. Justice McReynolds, Mr. Justice Stone, Mr. Justice Roberts. It was a five to four decision. The majority opinion was by Mr. Justice Roberts and the Chief Justice delivered the dissenting opinion, in which Justices Brandeis, Stone and Cardozo joined. The minority thought that it was within the power of Congress under the interstate commerce clause to pass an act of this type and that the pooling arrangement did not run counter to the Fifth Amendment. A majority of the present Court belong to the Brandeis-Cordozo-Stone school of thought and it is fairly safe to say that they would now uphold the essential provisions of such an act.

The same Court, in an opinion by Mr. Justice Brandeis, unanimously held violative of the Fifth Amendment the Frazier-Lemke Act in 1934, which gave a bankrupt farmer-mortgagor the right to purchase his mortgaged farm at its then appraised value or, in the event the mortgagee did not consent, to a stay of proceedings for five years, during which time he should stay in possession provided he paid a reasonable rent with the option to repurchase at appraised value.[30]

The same Court held unconstitutional the labor provisions of the Bituminous Coal Act of 1935 on the ground that it violated the same constitutional provision. Justices Cardozo, Brandeis and Stone dissented and the Chief Justice filed a qualified dissent.[31] Here again it is likely that today the decision would follow the opinion of the minority.

In *Morehead v. New York*[32] the same Court held unconstitutional the New York minimum wage law on authority of the *Adkins* case,[33] which had held a similar federal law applicable to the District of Columbia violative of the Fifth Amendment. The Chief Justice and Justices Brandeis, Stone and Cardozo dissented.

In 1937 this minority, by the shift of Mr. Justice Roberts, became a majority and the *Adkins* case was expressly overruled.[34]

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[29]Railroad Retirement Board v. Alton R. R., 295 U. S. 330, 79 L.ed. 1468 (1935).
[30]Louisville Joint Stock Land Bank v. Radford, 295 U. S. 555, 79 L.ed. 1593 (1935).
[31]Carter v. Carter Coal Co., 298 U. S. 238, 80 L.ed. 1160 (1936).
[32]298 U. S. 587, 80 L.ed. 1347 (1936).
[33]Adkins v. Children's Hospital, 261 U. S. 525, 67 L.ed. 785 (1923).
[34]West Coast Hotel Co. v. Parrish, 300 U. S. 379, 81 L.ed. 703 (1937).

Divided in the same way the Court upheld the Social Security Act, holding that it was not, because of the exemptions made, violative of the Fifth Amendment, and that it was not, because of inducements held out to states to provide for aid to the unemployed, contrary to the Tenth Amendment.[35]

The same Court, with Justices Sutherland, Van Devanter and Butler dissenting, held that the Alabama Unemployment Compensation Act, which imposed upon employers the obligation to pay a certain percentage of their monthly payrolls into the state unemployment compensation fund, did not violate the due process clause of the Fourteenth Amendment.[36]

In the *Virginian Railway Company*[37] case the same Court, this time unanimous, held that the collective bargaining provision of the Railway Labor Act, as amended, imposing an obligation on the carrier to negotiate with the union representing a majority of the employees, was not violative of the due process clause. Mr. Justice Stone, speaking for the Court, said:

> "Even though Congress, in the choice of means to effect a permissible regulation of commerce, must conform to due process, . . . it is evident that where, as here, the means chosen are appropriate to the permissible end, there is little scope for the operation of the due process clause. . . . And the Fifth Amendment, like the Fourteenth, . . . is not a guaranty of untrammeled freedom of action and of contract."[38]

On the authority of the *Virginian Railway Company* case the *Jones & Laughlin Steel Corporation* case[39] held constitutional the National Labor Relations Act. It was held that its provisions forbidding discrimination against employees because of union activities and making such prohibition effective by operation of the National Labor Relations Board were not violative of the due process clause.

Also rejected was a claim that the provision of the Act authorizing the Board to order the payment of wages to employees wrongfully discharged was violative of the Seventh Amendment guaranteeing jury trial. The Court held that guarantee applied only to cases triable by jury at common law and did not cover a case of this character where the order for payment of money could be treated as incidental to equitable relief granted in a statutory proceeding.

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[35]Steward Machine Co. v. Davis, 301 U. S. 548, 81 L.ed. 1279 (1937).
[36]Carmichael v. Southern Coal & Coke Co., 301 U. S. 495, 81 L.ed. 1245 (1937).
[37]Virginia Ry. v. System Federation, 300 U. S. 515, 81 L.ed. 789 (1937).
[38]*Id.* at 558, 81 L.ed. at 805.
[39]NLRB v. Jones & Laughlin Steel Corp., 301 U. S. 1, 81 L.ed. 893 (1937).

Again the Court was sharply divided (five to four) but the minority, speaking through Mr. Justice McReynolds, based its dissent upon the ground that the Act was without the scope of the interstate commerce clause in that it dealt with manufacturing.

The cases just discussed all deal with substantive rights. However, it is not always easy to distinguish between cases of this type and those which are concerned with procedural due process.

Thus, in *Baltimore & Ohio Railroad v. United States,*[40] the majority held that on the issue of confiscation the person invoking the Bill of Rights was entitled to have a judicial determination of the facts. Mr. Justice Butler in the majority opinion, said:

> "Against the objection of the owner of private property taken for public use, the Congress may not directly or through any legislative agency finally determine the amount that is safeguarded to him by that clause.
>
> "If as to the value of his property the owner accepts legislative or administrative determinations or challenges them merely upon the ground that they were not made in accordance with statutes governing a subordinate agency, no constitutional question arises."[41]

The Court held, however, that in that case there was no confiscation. Justices Brandeis, Stone, Roberts and Cardozo were careful to concur only in the result.

The importance of this opinion lies in the fact that if the reasoning of the majority prevails, one who raises a constitutional question before an administrative tribunal can not be precluded by an adverse finding of fact from judicial redress.

The same Court followed this reasoning in *St. Joseph Stockyards Co. v. United States,*[42] and the majority, speaking through the Chief Justice, said:

> "Legislative agencies, with varying qualifications, work in a field peculiarly exposed to political demands. Some may be expert and impartial, other subservient. It is not difficult for them to observe the requirements of law in giving a hearing and receiving evidence. But to say that their findings of fact may be

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[40]298 U. S. 349, 80 L.ed. 1209 (1936).
[41]*Id.* at 368, 80 L.ed. at 1224.
[42]298 U. S. 38, 52, 80 L. ed. 1033, 1041 (1936).

made conclusive where constitutional rights or liberty and property are involved, although the evidence clearly establishes that the findings are wrong and constitutional rights have been invaded, is to place those rights at the mercy of administrative officials and seriously to impair the security inherent in our judicial safeguards. That prospect, with our multiplication of administrative agencies, is not one to be lightly regarded. . . . Under our system there is no warrant for the view that the judicial power of a competent court can be circumscribed by any legislative arrangement designed to give effect to administrative action going beyond the limits of constitutional authority."

Again Justices Roberts, Brandeis, Stone and Cardozo concurred in the result which was a holding that there was no confiscation.

The *St. Joseph Stockyards Co.* case clarifies the *Baltimore & Ohio Railroad* case by pointing out that while the reviewing court must exercise its independent judgment, this does not mean that it must make its own findings as independently as if there had been no administrative finding. The Chief Justice said:

> "Judicial judgment may be none the less appropriately independent because informed and aided by the sifting procedure of an expert legislative agency. . . . The established principle which guides the court in the exercise of its judgment on the entire case is that the complaining party carries the burden of making a convincing showing and that the court will not interfere with the exercise of the rate making power unless confiscation is clearly established."[43]

More nearly typical is *Morgan v. United States*[44] in which it was held there had not been a full and fair hearing when the Acting Secretary of Agriculture under the Packers' and Stockyards Act fixed maximum rates chargeable by stockyards after a sketchy consideration of a voluminous record and when he accepted and made his own findings prepared by the active prosecutors for the Government after an *ex parte* discussion with them and without according any reasonable opportunity to the respondents to know the claims thus presented and to contest them.

The Chief Justice, speaking for himself, Justices McReynolds, Brandeis, Butler, Stone and Roberts, said:

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[43] *Id.* at 53, 80 L.ed. at 1042.
[44] 304 U. S. 1, 82 L.ed. 1129 (1938).

> "The maintenance of proper standards on the part of administrative agencies in the performance of their quasi-judicial functions is of the highest importance and in no way cripples or embarrasses the exercise of their appropriate authority. On the contrary, it is in their manifest interest. For, as we said at the outset, if these multiplying agencies deemed to be necessary in our complex society are to serve the purposes for which they are created and endowed with vast powers, they must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play."[45]

Mr. Justice Black recorded his dissent but filed no opinion. Justices Cardozo and Reed did not participate.

In an entirely typical case[46] three justices who have left the bench since 1932, joined by Justices McReynolds and Roberts, held the Seventh Amendment violated by the trial court in conditioning the allowance of plaintiff's motion for a new trial in a personal injury action based on inadequacy of the verdict upon the refusal of the defendant to an increase in the amount of damages from $500.00 to $1500.00.

Mr. Justice Stone wrote the dissenting opinion which was concurred in by the Chief Justice and Justices Brandeis and Cardozo.

The same Court, this time unanimously, held that the Circuit Court of Appeals may, where question is reserved, direct dismissal of a complaint without violating the Seventh Amendment upon reversing a judgment on a verdict for plaintiff in an action at law for error of the trial court in denying a motion in the alternative for a dismissal and for a directed verdict.[47]

Slocum v. New York Life Insurance Co.,[48] which had held that this could not be done when the question was not reserved, was distinguished.

There is now pending on *certiorari* an interesting case which poses the question of whether this action can be constitutionally taken under the Federal Rules of Civil Procedure [Rule 50 (b)] which provides that there shall be deemed to have been a reservation in all cases.

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[45]*Id.* at 22, 82 L. ed. at 1134.
[46]Dimick v. Schiedt, 293 U. S. 474, 79 L. ed. 603 (1935).
[47]Baltimore & Carolina Line v. Redman, 295 U. S. 654, 79 L. ed. 1636 (1935).
[48]228 U. S. 364, 57 L. ed. 879 (1913).

I venture the prediction that the power to take this action will be sustained.[49]

When we come to questions which might bear upon the safety and unity of the nation we find no sharp division of opinion. The Court as constituted at the beginning of the first Roosevelt administration unanimously held that compulsory military training in a State University applicable to conscientiously objecting Methodists was not repugnant to the Fourteenth Amendment. Justice Butler said:

> "Government, federal and state, each in its own sphere owes a duty to the people within its jurisdiction to preserve itself in adequate strength to maintain peace and order and to assure the just enforcement of law. And every citizen owes the reciprocal duty, according to his capacity, to support and defend government. . . ."[50]

In the flag-salute case[51] the present Court (Mr. Justice Stone alone dissenting) in an eloquent opinion by Mr. Justice Frankfurter, held that there was no unconstitutionalty in a requirement of a school board that school children, as a condition of their attendance at a public school, participate in daily exercises of salute to the flag, although such children had religious scruples against such a show of allegiance.

That the Court was fully conscious of the gravity of the conflict between the claim of personal liberty and religious freedom and the necessity for national strength and unity is shown by Mr. Justice Frankfurter's opening sentence:

> "A grave responsibility confronts this Court whenever in course of litigation it must reconcile the conflicting claims of liberty and authority. But when the liberty invoked is liberty of conscience, and the authority is authority to safeguard the nation's fellowship, judicial conscience is put to its severest test."[52]

The last two cases must be considered in view of the light afforded by

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[49]Montgomery Ward & Co. v. Duncan, 85 L. Ed. 132 (U. S. 1940), sustains the prediction. *Cf.* Reliance Life Ins. Co. v. Burgess, 112 F. (2d) 234 (C. C. A. 8th, 1940), *cert. denied,* November 12, 1940; Ferro Concrete Construction Co. v. United States, 112 F. (2d) 488 (C. C. A. 1st, 1940), *cert. denied,* November 12, 1940; Conway v. O'Brien, 111 F. (2d) 611 (C. C. A. 2nd, 1940), *cert. denied,* October 21, 1940.

[50]Hamilton v. University of California, 293 U. S. 245, 262, 79 L. ed. 343, 353 (1934).

[51]Minersville School District v. Gobitis, 310 U. S. 586, 84 L. ed. 1375 (1940).

[52]*Id.* at 591, 84 L. ed. at 1377.

the opinions delivered in the cases that arose under the Espionage Act of 1917.[53]

The remaining cases dealing with personal liberty are not complicated by the considerations involved in those just mentioned.

The Sixth Amendment was held not to guarantee trial by jury for petty offenses and the Fifth Amendment not to guarantee right of appeal.[54]

Mr. Justice Stone in the majority opinion cited in support of his conclusion an article in the *Harvard Law Review* in which Mr. Justice Frankfurter, who had not become a member of the Court when the case was decided, had collaborated many years ago with Mr. Thomas Corcoran.[55]

In 1939 the Court unanimously held that the National Firearms Act regulating and taxing the transfer of certain types of firearms and requiring the registration of such arms by persons in possession of them did not impinge upon the constitutional right to bear arms.[56]

Recently the Supreme Court denied *certiorari* in a case in which the Circuit Court of Appeals had held that an inspection by the Wage and Hour Administrator of Montgomery Ward & Company's records without a showing of probable cause of violation of the act, did not constitute unreasonable search and seizure.[57]

Since the beginning of the October 1934 term, in at least ten cases, asserted constitutional rights of freedom of the press, of speech, of assembly and of religion have been sustained. Nor have these cases resulted in any sharp division in the Court.

In the leading freedom of the press case[58] a unanimous Court held that a Louisiana statute imposing a license tax based on gross receipts for the privilege of engaging in the business of publishing advertising in any newspaper, magazine, periodical or publication whatever having a circulation of more than 20,000 copies per week, abridged the freedom of the press in violation of the due process clause of the Fourteenth Amendment.

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[53]Schenck v. United States, 249 U. S. 47, 63 L. ed. 470 (1919); Frohwerk v. United States, 249 U. S. 204, 63 L. ed. 561 (1919); Debs v. United States, 249 U. S. 211, 63 L. ed. 566 (1919); Abrams v. United States, 250 U. S. 616, 63 L. ed. 1173 (1919).

[54]District of Columbia v. Clawans, 300 U. S. 617, 81 L. ed. 843 (1937).

[55]Frankfurter and Corcoran, *Petty Offenses and the Constitutional Guaranty of Trial By Jury* (1926) 39 HARV. L. REV. 917.

[56]United States v. Miller, 307 U. S. 174, 83 L. ed. 1206 (1939).

[57]Montgomery, Ward & Co. v. Fleming, 114 F. (2d) 384 (C. C. A. 7th, 1940), *cert. denied*, October 28, 1940.

[58]Grosjean v. American Press Co., 297 U. S. 233, 80 L. ed. 660 (1936).

It was held that the due process clause of the Fourteenth Amendment protects the freedom of the press against state action as fully as does the First against national action.

It is not to be overlooked that in this case the attempted restriction was based upon the power to tax, a power which in many cases the Court had broadly sustained.[59]

The Court, again unanimous, held that the Criminal Syndicalism Law of Oregon as applied to punish a man assisting in the conduct of a lawful meeting called by the Communist Party violated the fundamental rights of freedom of speech and assembly guaranteed by the Fourteenth Amendment of the Constitution.[60]

However, in the same year (1937) the Court divided (five to four) in holding that the guaranties of freedom of speech and assembly of the Fourteenth Amendment were violated by the conviction of defendant for inciting to insurrection by violence based on addresses to meetings of Communist Party and organizers thereof.[61]

The dissenters were Justices Van Devanter, McReynolds, Sutherland and Butler.

In 1938 Mr. Justice Black had replaced Mr. Justice Van Devanter and Mr. Justice Reed had replaced Mr. Justice Sutherland. In that year the Court was unanimous in three cases.

An ordinance of the City of Griffin, Georgia, prohibiting the distribution of circulars, etc., without the permission of the city manager, was held invalid as violating the fundamental freedom of speech and freedom of the press protected by the Fourteenth Amendment from invasion by state action, just as the First Amendment protects them from infringement by Federal action.[62]

In a *per curiam* decision the Court reaffirmed its doctrine that a negro charged with murder in a Kentucky prosecution was denied due process under the Fourteenth Amendment when negroes were systematically and arbitrarily excluded from grand and petit jury lists because of their race and color.[63]

A defendant on trial in a Federal District Court for a criminal offense has the right to counsel under the Sixth Amendment and the failure

[59] *Cf.* McGoldrick v. Berwind-White Coal Mining Co., 309 U. S. 33, 84 L.ed. 565 (1940).
[60] DeJonge v. Oregon, 299 U. S. 353, 81 L.ed. 278 (1937).
[61] Herndon v. Lowery, 301 U. S. 242, 81 L.ed. 1066 (1937).
[62] Lovell v. City of Griffin, 303 U. S. 444, 82 L.ed. 949 (1938).
[63] Hale v. Kentucky, 303 U. S. 613, 82 L.ed. 1050 (1938).

to respect such right, where not waived, deprives the trial court of jurisdiction.[64]

In 1939 in *Hague v. Committee for Industrial Organization,*[65] the Court (Justices McReynolds and Butler dissenting) upheld the claimed right of free speech and peaceable assembly.

The first opinion, delivered by Mr. Justice Roberts, in which Mr. Justice Black concurred, held that the ordinance of Jersey City requiring the obtaining of a permit for a public assembly in or upon the public streets or public parks of that city and authorizing the Director of Public Safety, for the purpose of preventing riots, disturbances or disorderly assemblage, to refuse issuance when, after investigation of all the facts and circumstances pertinent to the application, he believed it to be proper to do so, deprived the Committee for Industrial Organization of their rights and privileges as citizens of the United States, contrary to the provisions of the Fourteenth Amendment.

The second opinion, written by Mr. Justice Stone, in which Mr. Justice Reed concurred, reached the same result upon the ground that the ordinance in question constituted a deprivation of the plaintiffs' liberty without due process of law, and that included in the term "liberty" was freedom of speech and freedom of assembly.

Mr. Justice Roberts said:

> "Although it has been held that the Fourteenth Amendment created no rights in citizens of the United States, but merely secured existing rights against state abridgment, it is clear that the right peaceably to assemble and to discuss these topics, and to communicate respecting them, whether orally or in writing, is a privilege inherent in citizenship of the United States which the Amendment protects. . . . Citizenship of the United States would be little better than a name if it did not carry with it the right to discuss national legislation and the benefits, advantages, and opportunities to accrue to citizens therefrom. All of the respondents' proscribed activities had this single end and aim."[66]

The next four cases about to be mentioned were decided by the Court as now constituted and in each case the decision upheld the asserted constitutional right.

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[64]Johnson v. Zerbst, 304 U. S. 458, 82 L. ed. 1461 (1938).
[65]307 U. S. 496, 83 L. ed. 1423 (1939).
[66]*Id.* at 512, 83 L. ed. at. 1435.

Ordinances prohibiting the distribution of hand-bills were stricken, it being held that such regulations could not stand against the right of free speech on the claimed grounds that their purpose was to keep the streets clean.[67]

An Alabama statute prohibiting peaceful picketing was held to violate the right of free speech.[68] Speaking for the Court, Mr. Justice Murphy said:

> "In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution. *Hague v. C. I. O.*, 307 U. S. 496; *Schneider v. State,* 308 U. S. 147, 155, 162-63. . . . See *Senn v. Tile Layers Protection Union,* 301 U. S. 468, 478. It is recognized now that satisfactory hours and wages and working conditions in industry and a bargaining position which makes these possible have an importance which is not less than the interests of those in the business or industry directly concerned. The health of the present generation and of those as yet unborn may depend on these matters, and the practices in a single factory may have economic repercussions upon a whole region and affect widespread systems of marketing. The merest glance at State and Federal legislation on the subject demonstrates the force of the argument that labor relations are not matters of mere local or private concern. Free discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society. The issues raised by regulations, such as are challenged here, infringing upon the right of employees effectively to inform the public of the facts of a labor dispute are part of this larger problem. We concur in the observation of Mr. Justice Brandeis, speaking for the Court in *Senn's* case (301 U. S. 478): 'Members of a union might, without special statutory authorization by a State, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution.' "[69]

In these two cases Mr. Justice McReynolds alone dissented.

In the *Cantwell* case,[70] a unanimous Court held invalid a Connecticut statute forbidding any person to solicit money, services or subscrip-

[67]Schneider v. Irvington, 308 U. S. 147, 84 L.ed. 155 (1939).
[68]Thornhill v. Alabama, 310 U. S. 88, 84 L.ed. 1093 (1940).
[69]*Id.* at 102, 84 L.ed. at 1102.
[70]Cantwell v. Connecticut, 310 U. S. 296, 84 L.ed. 1213 (1940).

tions for any religious cause from other than a member of the organization for whose benefit such person is solicited, unless such cause should have first been approved by the Secretary of the Public Welfare Council. The defendants in that case were members of a sect known as Jehovah's Witnesses, and they solicited money on the public streets of a Connecticut city on behalf of such sect, without obtaining the necessary approval of the Secretary of Public Welfare. In doing so, they played a victrola record which criticized all organized religions and the Roman Catholic Church in particular.

Mr. Justice Roberts speaking for the Court said:

> "In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.
>
> "The essential characteristic of these liberties is, that under their shield many types of life, character, opinion and belief can develop unmolested and unobstructed. No where is this shield more necessary than in our own country for a people composed of many races and of many creeds. There are limits to the exercise of these liberties. The danger in these times from the coercive activities of those who in the delusion of racial or religious conceit would incite violence and breaches of the peace in order to deprive others of their equal right to the exercise of their liberties, is emphasized by events familiar to all. These and other transgressions of those limits the states appropriately may punish."[71]

You will have noted that in a number of the recent cases questions arose under the Bill of Rights while the Court was dealing with labor relations. Most of these are cases where the Court has declined to hold that legislation designed to benefit labor contravenes the Bill of Rights or where employees have successfully sought its protection. However, in a case[72] decided October 8th, it was the employer who successfully invoked

[71]Cantwell v. Connecticut, 310 U. S. 296, 310, 84 L.ed. 1213, 1221 (1940).
[72]NLRB v. Ford Motor Co., 114 F. (2d) 905 (C. C. A. 6th, 1940).

the constitutional guarantee of free speech. The Circuit Court of Appeals for the Sixth Circuit held that Henry Ford had a right—notwithstanding the objection of the National Labor Relations Board—to distribute to his employees a pamphlet—"The Musings of Smokestack Joe"—in which an uncomplimentary opinion of labor unions was expressed. Judge Simons, writing for a unanimous court, said:

> "The right of employees to organize for collective bargaining, to select representatives of their own choosing and to unite for concerted action in other respects is now so clearly recognized as a fundamental right that citation is superfluous.
>
> "The right to hold views upon any and all controversial questions, to express such views and to disseminate them to persons who may be interested has even more venerable sanction. This, the board, in argument and brief, clearly recognizes by the distinction it seeks to draw between the right of Mr. Ford generally to express his labor views and his right to distribute literature expressing such views to his employees in the manner adopted. The latter, it holds, had the effect of interference, restraint or coercion condemned by the statute. We have difficulty in sensing the distinction.
>
> "The right to form opinion is of little value if such opinion may not be expressed, and the right to express it is of little value if it may not be communicated to those immediately concerned. . . .
>
> "Nowhere in the National Labor Relations Act is there sanction for an invasion of the liberties guaranteed to all citizens by the First Amendment. . . .
>
> "We do not ignore the view that 'any sort of influence exerted by an employer upon an employee, depending upon his employer for means of livelihood, may very easily become undue in that it will coerce the employee's will in favor of what the employer desires against his better judgment. . . . '
>
> "This holds the employer forever suspect and its practical application must necessarily silence him whose opinion may be the best informed, no matter how honestly his views may be entertained, or how truthful may be his observations. If the concept that an employer's opinion of labor organization and organizers must, because of the authority of master over servant, nearly always prove coercive, ever had validity, it is difficult now to

say, in view of the National Labor Relations Act, its adjudication as constitutionally valid, its strict enforcement by the National Labor Relations Board, and the liberal attitude of the courts in construing it so as best to effectuate its great social and economic purpose, that the concept is still a sound one.

> "The servant no longer has occasion to fear the master's frown of authority or threats of discrimination for union activities, express or implied. . . . We have previously observed 'unless the right of free speech is enjoyed by employers as well as by employees the guaranty of the First Amendment is futile for it is fundamental that the basic rights guaranteed by the Constitution belong equally to every person'."[73]

In this connection there may be mentioned as evidence of the growing recognition among the members of the bar of the importance of the Bill of Rights, the fact that the American Bar Association in 1938 appointed a special committee on the Bill of Rights, the function of which is to investigate instances of seeming violations of these rights and, in proper cases, take steps to defend such rights.[74]

This committee has already filed briefs as *amicus curiae* in the flag-salute and the *Hague* Cases, and in its report to the Philadelphia meeting of the Association it announced:

> "In harmony with the policy just mentioned the committee has resolved (subject to a final determination after a review of recent decisions and to possible legislative developments) to ask leave to file a brief *amicus curiae* in the Supreme Court in a test case involving employers' rights of free speech and press under provisions of the National Labor Relations Act."[75]

In view of this statement it is highly probable that the committee will file a brief as *amicus curiae* in the *Ford* case, which will no doubt be taken to the Supreme Court.

In discussing the more recent cases I have included some decided under the due process clause of the Fourteenth Amendment, which is operative only against the states. This I have done because some, but not all of the rights which are specifically protected against national action by the Bill of Rights are equally protected against state action by the due

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[73]NLRB v. Ford Motor Co., 114 F. (2d) 905 (C. C. A. 6th, 1940).
[74]64 A. B. A. Rep. 89, 285 (1938).
[75]Report of Special Committee on Bill of Rights presented to House of Delegates, A. B. A. Philadelphia Meeting, 1940.

process clause of the Fourteenth Amendment. When the protection is the same, its extent is identical in each instance; and a case decided under one amendment is authority under the other. Precisely what rights are protected under the Fourteenth Amendment has not been determined. But in appraising the cases I have mentioned it is well to have in mind the language of Justice Cardozo in *Palko v. Connecticut*:[76]

> "We have said that in appellant's view the Fourteenth Amendment is to be taken as embodying the prohibitions of the Fifth. His thesis is even broader. Whatever would be a violation of the original bill of rights (Amendments 1 to 8) if done by the federal government is now equally unlawful by force of the Fourteenth Amendment if done by a state. There is no such general rule. . . . On the other hand, the due process clause of the Fourteenth Amendment may make it unlawful for a state to abridge by its statutes the freedom of speech which the First Amendment safeguards against encroachment by the Congress . . . or the like freedom of the press . . . or the free exercise of religion . . . or the right of peaceable assembly, without which speech would be unduly trammeled . . . , or the right of one accused of crime to the benefit of counsel. . . . In these and other situations immunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states. . . .
>
> "We reach a different plane of social and moral values when we pass to the privileges and immunities that have been taken over from the earlier articles of the federal bill of rights and brought within the Fourteenth Amendment by a process of absorption. These in their origin were effective against the federal government alone. If the Fourteenth Amendment has absorbed them, the process of absorption has had its source in the belief that neither liberty nor justice would exist if they were sacrificed."[77]

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[76]302 U. S. 319, 82 L.ed. 288 (1937). In this case the due process clause was invoked. A Connecticut statute permitted an appeal by the State in a criminal case. The accused was convicted of second degree murder in the first trial. On appeal there was a reversal and a conviction of first degree murder in the second trial. It was held that the accused had been deprived of no right guaranteed by the Federal Constitution.

[77]*Id.* at 323, 82 L.ed. at. 291.

In the discussion so far I have drawn no general conclusions. I have refrained from doing this in the hope that the presentation and arrangement of the cases might suggest to you your own conclusions. Now, however, I shall give, for whatever it may be worth my own view as to the significance of the present Court's treatment of the Bill of Rights. I have supplemented my reading of the cases by an examination of some of the extra-judicial writings of the members of the present Court.

Whenever the power to legislate is found within the Constitution proper, under the liberal current construction of it, that power will not be held to be circumscribed by the Ninth and Tenth Amendments.

Even when the decision hinges upon the extent of the power the Court will, in cases involving property rights, be extremely reluctant to strike down with the Bill of Rights legislation which conceivably, according to the prevailing philosophy, is for the general welfare. I said "reluctant." I think I may safely say more reluctant than ever before in its history.

As to procedural due process there is no evidence that the Court will countenance a relaxation of the essential requirements. There is evidence both in opinions and in the promulgation of the Rules of Civil Procedure that non-essentials will be summarily dealt with in the interest of speed and certainty of justice.

In sustaining legislation that it can see has a reasonable relation to national unity and safety, I believe the Court will go as far and perhaps further than it has ever gone. This I deduce not alone from the decisions. The language and tone of the opinions are even more significant. Should war come I can not believe that any provision of the Bill of Rights would be permitted to impede the exercise of our utmost effort. I doubt whether even such a constitutional landmark as Ex Parte *Milligan* would protect against summary trial one who would seek to create disaffection in our armed forces. The Court could not be deaf to the inexorable logic of events. The havoc so recently wrought in other lands by so called fifth columnists would be an argument more persuasive than the citation of an array of authorities. It would no doubt be urged that the people of a democracy in order that war may be efficiently waged must temporarily forego some of their cherished rights. In this connection it would be pointed out that England, whence came our Bill of Rights, has found it necessary to give the executive the broad power to make such regulations as may be "necessary or expedient for securing the public

safety, the defense of the realm and the efficient prosecution"[78] of the war, and that under this authority minute and stringent orders have been made taking over property and drastically restricting the freedom of speech, of the press and of the right of assembly.

These would be powerful arguments before a court called upon to weigh the rights of an individual against the safety of the nation.

National security aside, I believe that no Court has ever been more zealous in protecting personal liberty—freedom of speech, of the press, of religion and other "inalienable rights"—than the present Court has been and will continue to be.

What I have said perhaps sufficiently demonstrates the contemporary significance of the Bill of Rights. If further emphasis is needed it can be found in some of the cases in addition to those already mentioned which are already on the docket of the Court at this term. Some of the questions awaiting decisions are:

Does a state court injunction against peaceful picketing by a labor union violate the right of free speech?[79] Does an order holding a labor union leader in contempt of court for sending to the Secretary of Labor and making public a telegram denouncing a court decision as outrageous violate the right of free speech?[80]

Is the right of free speech violated by a holding that an editor is in contempt of court when, pending further proceedings, he editorially approves the conviction of sit-down strikers?[81] Does a minimum wage order under the Fair Labor Standards Act deprive southern mill owners of property without due process?[82] Does a construction of the Espionage Act which applies it to the supplying by one Russian to another inform-

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[78]Emergency Powers (Defense) Act. 2 & 3 George VI Ch. 32; 3 & 4 George VI Ch. 20.

[79]Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc., 371 Ill. 377, 21 N. E. (2d) 308 (1939). Certiorari was the first denied by the Supreme Court October 23, 1939, 84 L. ed. 499. Counsel persistently sought review, and motion to rehear was denied December 4, 1939, 84 L. ed. 530. Finally upon a second motion to rehear the former order denying certiorari was vacated and certiorari granted June 3, 1940, 84 L. ed. 1419, and cause was argued at the October term, 1940.

[80]Bridges v. California, 14 Cal. (2d) 464, 94 P. (2d) 983 (1939), *cert. granted,* 84 L. ed. 1001 (U. S. 1940).

[81]Times-Mirror Co. v. Superior Court of California, 15 Cal. (2d) 99, 98 P. (2d) 1029 (1940), *cert. granted,* 84 L.ed. 1395 (U. S 1940).

[82]Opp Cotton Mills v. Administrator of Wage and Hour Division, 111 F. (2d) 23 (C. C. A. 5th, 1940), *cert. granted,* October 14, 1940.

ation of activities of the Japanese in the United States violate the Fifth Amendment?[83]

I shall not further labor the point. Enough has been said, I believe, to prove that not Hamilton but Jefferson held the correct view as to the necessity of a Bill of Rights. So true is this that it now seems that it alone can retard the swelling flood of federal power. One who holds with Jefferson that federal power should be limited might well exclaim: "The stone which the builders refused is become the headstone of the corner."

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[83]Gorin v. United States, 111 F. (2d) 712 (C. C. A. 9th, 1940), *cert. granted*, 84 L.ed. 1394 (1940), aff'd, Jan. 13, 1941, 9 U. S. LAW WEEK, Vol. 9 § 4, p. 4128.

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NOTES AND COMMENTS

Service of Federal Process on Agent of Nonresident Defendant in Another Federal District Within the State

It has long been an established rule of practice and procedure in the federal districts that service of process cannot run outside the district of the court having jurisdiction of the action, except in certain cases specified by statute.[1] Adherence to this rule, however, has often led to difficult problems, particularly in the situation where a plaintiff, resident of one district of a state, desires to sue in federal court a nonresident defendant, who has an agent for service of process in another district of the state. Under the federal venue statute,[2] a suit in which jurisdiction is founded solely upon diversity of citizenship must be brought in the district of the residence of either the plaintiff or the defendant. If, therefore, the plaintiff in such a situation, brings his suit in the district where the agent resides, and where effective service can be secured, the venue of the action is improper; whereas, if the plaintiff brings his suit in the district of his own residence, where venue is proper, then he cannot secure effective service of process upon the defendant or his agent. The only recourse for the plaintiff in such a situation is to bring suit in the district of the defendant's residence, a remedy which would often entail more trouble and expense than the relief would justify.

Rule 4 (f) of the Rules of Civil Procedure for the District Courts of the United States, adopted by the Supreme Court of the United States in 1937, provides: "All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held and, when a statute of the United States so provides, beyond the territorial limits of that state. A subpoena may be served within the territorial limits provided in Rule 45."

At first blush, this rule would seem to cure effectively the difficulty of the situation mentioned above, and yet in the cases involving such a situation which have arisen since the adoption of the new rule, there has been a direct conflict of opinion among the district courts.[3]

The serious objection made to this construction of the new Rule 4 (f) is that, thus construed, it is an enlargement of the jurisdiction and

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[1]Robertson v. Railroad Labor Board, 268 U. S. 619, 45 Sup Ct. 621, 69 L. ed. 1119 (1935); Munter v. Weil Corset Co., 261 U. S. 276, 43 Sup. Ct. 347, 67 L. ed. 652 (1923); Toland v. Sprague, 12 Pet. 300, 9 L. ed. 1093 (U. S. 1838). Statutes permitting service outside of the district fall roughly into three classes: (1) in suits of local nature, (2) in suits where there are plural defendants living in different districts of the same state, and (3) in suits under certain statutes of the United States. See 17 Hughes, Federal Practice (1940) § 18992.

[2]Jud. Code § 51, 28 U. S. C. A. § 112.

[3]Williams v. James, 34 F. Supp. 61 (W. D. La. 1940); Carby v. Greco, 31 F. Supp. 251 (W. D. Ky. 1940); Melekov v. Collins, 30 F. Supp. 159 (S. D. Cal. 1939); Gibbs v. Emerson Electric Mfg. Co., 29 F. Supp 810 (W. D. Mo. 1939); Devier v. George Cole Motor Co., 27 F. Supp. 978 (W. D. Va. 1939).

venue of the district courts beyond the authority of the enabling act of 1934,[4] pursuant to which the Rules of Civil Procedure were adopted, and in violation of Rule 82,[5] which provides: "These rules shall not be construed to extend or limit the jurisdiction of the district courts of the United States or the venue of actions therein." This objection has led some courts to the conclusion that even though a district court has jurisdiction over the subject matter of an action, and even though venue is proper, yet process cannot run into another district in order to obtain jurisdiction over the person of the defendant.[6]

In the case of *Melekov v. Collins,*[7] McCormick, D. J., discusses the conflict of Rule 4 (f) with the enabling act of 1934 as follows: "It is obvious that the only legislative authorization to establish rules to govern civil cases is such as provides solely for adjective matters in the course of litigation in controversies of a civil nature, as distinguished from substantive ones. The latter are to remain secure to all litigants. . . .

"In my opinion, Rule 4 (f) ex proprio vigore could not, even if there did not exist in the Federal Rules of Procedure a correlative requirement, operate to compel the nonresident defendant Vaught to submit personally to the jurisdiction of this district court in the case at bar. This rule is necessarily and expressly limited in its scope by the Act of Congress."

In the subsequent decision of the District Court for the Western District of Kentucky in the case of *Carby v. Greco,*[8] the court follows this holding, noting at the same time that the method of serving process is procedural, but the effect of such process when served is jurisdictional,[9] and that the effect of holding the service valid in that case under Rule 4 (f) would be to obtain jurisdiction over the defendants where jurisdiction did not exist before.

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[4] 48 STAT. 1064, 28 U. S. C. A. § 723b (1934).

[5] FED. RULES CIV. PROC., Rule 82, 28 U. S. C. A. following § 723b (1937).

[6] In the cases of Devier v. George Cole Motor Co., 27 F. Supp. 978 (W. D. Va. 1939); Carby v. Greco, 31 F. Supp. 251 (W. D. Ky. 1940); and Williams v. James, 34 F. Supp. 61 (W. D. La. 1940), identical factual situations were before the courts: Plaintiff, injured by an automobile driven by a nonresident defendant, sued in the federal district court of the district where he resided, and in the state where the accident occurred. Process was served on the Secretary of State at the state capital, which was in another federal district of the state. State statutes in all three cases made the Secretary of State the agent for service of process upon nonresident motorists. In the *Devier* and *Williams* cases, such service was held effective. The case of Carby v. Greco held such service not effective.

[7] 30 F. Supp. 159, 160 (S. D. Cal. 1939). In this case the accident occurred in Oklahoma, where the defendant resided. Plaintiff, resident of the Southern District of California, brought the action in that district, serving process upon the defendant, who was at the time present in the Northern District of California. The holding in this case that such service is not effective may be justified under the doctrine of *forum non conveniens.*

[8] 31 F. Supp 251 (W. D. Ky. 1940). Although the court here cites the holding in Melekov v. Collins, note 7 *supra,* the two cases are readily distinguishable as to their facts. While the holding in the *Melekov* case may be justified, it is difficult to see any justification for the holding in the *Carby* case. See facts set forth in note 6 *supra.*

[9] The court here cites the leading case of Sewchulis v. Lehigh Valley Coal Co., 233 Fed. 422 (C. C. A. 2d, 1916).

Since a number of cases involving the construction of Rule 4 (f) have already come before the courts, and since the problem is one which is very likely to arise frequently under the increasingly common state statutes providing for the appointment of state officials as agents for service of process by certain nonresident defendants operating within the state,[10] it seems advantageous to investigate the arguments which have been urged to overcome the objection to allowing service to run outside of the geographical limits of the district where it is issued.

An argument developed by the court in the recent decision of *Williams v. James*[11] proceeds thus: Objections that Rule 4 (f) enlarged the jurisdiction of the district courts were specifically presented to the Supreme Court of the United States by the committee which drafted the Rules of Civil Procedure, yet the Supreme Court left that Rule untouched.[12] Moreover, after the Rules were promulgated and reported by the Supreme Court to Congress, Congress adopted them intact. This, it is considered, was a congressional enactment characterizing Rule 4 (f) as procedural, to which the long line of decisions characterizing Section 503 of the Judicial Code[13] as creating substantive rights must give way. This argument finds support in the fact that the amendment of 1935 omitted the phrase "throughout the district" from Section 503, thereby harmonizing that section with Rule 4 (f) of the Rules of Civil Procedure.

It is submitted, however, that this argument is not one which would be of great use to the Supreme Court in reconciling the terms of Rules 4 (f) and 82. In the first place, the mere fact that Congress adopted Rule 4 (f) together with Rule 82 does not amount to a definite characterization by Congress of Rule 4 (f) as procedural. It is evident both from the enabling act, and from Rule 82 that Congress intended that none of the Rules of Civil Procedure should enlarge or limit the jurisdiction of the federal district courts; and, having expressed its intention thus, it is very likely that Congress would leave to the determination of the judiciary

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[10]Rule 4 (d) (7) of the Rules of Civil Procedure expressly provides that service of summons upon agents appointed to conform with state law shall be sufficient to give jurisdiction to the federal courts. It may be noted in this regard that the Mississippi statute providing for service of process upon the Secretary of State as agent for a non-resident defendant has a much broader scope than the usual statute. Miss. Laws 1940, c. 246, § 1. Should the federal district courts of Mississippi adopt the holding of the Kentucky court in the case of Carby v. Greco, 31 F. Supp. 251 (W. D. Ky. 1940), the result would be that a plaintiff, resident of the southern district of the state might bring in that district an action against a nonresident upon a cause of action arising within the state; while a resident of the northern district, suing the same person upon the same cause of action, would be forced to bring the action in the district of the defendant's residence.

[11]34 F. Supp. 61 (W. D. La. 1940).

[12]*Advisory Committee Report,* April, 1937, Rule 4 (f), Note to the Supreme Court.

[13]49 STAT. 377 (1935), 28 U. S. C. A. § 503. This statute is the basis for the former rule that process cannot run outside of the district where it is issued. The following cases have held that this statute creates a substantive right: Keller v. American Sales Book Co., 16 F. Supp. 189 (D. C. N. Y. 1936); Boykin v. Hope Production Co., 58 F. (2d) 1041 (D. C. La. 1931); J. E. Petty & Co., Inc. v. Dock Contractor Co., 283 Fed. 341 (C. C. A. 3rd, 1922); Sewchulis v. Lehigh Valley Coal Co., 233 Fed. 422 (C. C. A. 2nd, 1916).

the question of whether or not the several rules were in conflict with that intention, rather than attempt itself to characterize each rule separately as "procedural" or "jurisdictional." In the second place, it is doubtful whether, if a particular rule should appear to the judiciary actually to abridge the substantive rights of the litigant, a broad declaration by Congress that all of the Rules are procedural would be of any effect.

The strongest argument for allowing service of process to run into another district of the state is suggested by the comments of the members of the Advisory Committee upon the Rules of Civil Procedure. Dean Clark, the Reporter of the Committee, said concerning Rule 4 (f): "The question has been raised whether this is not a substantive change, one affecting jurisdiction and venue. I might say on that, it is our theory that definitely it is not. This is not a matter of either the jurisdiction of the court, what matters the court shall hear and decide, or of the venue, which is the place where certain kinds of action shall be tried. This affects neither one of those points. . . . "[14]

In and of itself, however, this statement is not free from objection, for it appears to be based upon the specious assumption that jurisdiction in the federal district courts is concerned solely with what matters the court may hear and decide. This assumption is clearly out of line with the well-established rule that the term *jurisdiction,* as applied to actions in personam, includes not only the power of the court to hear and determine the subject matter of a particular action—often described as *jurisdiction of the subject matter—,* but also its power to acquire control of the personal rights and duties of the defendant—often described as *jurisdiction in personam.*[15] In order, therefore, accurately to characterize Rule 4 (f) as procedural, some independent basis of jurisdiction of the person of the defendant must first be established.

One method by which such jurisdiction may be established is an application of the "consent doctrine," based upon the decision of the Supreme Court of the United States in the case of *Neirbo v. Bethlehem Shipbuilding Corp.*[16] In that case it was held that the actual appointment of an agent for service of process in a district of the state, by a nonresident defendant, amounted to a consent by that defendant to be sued in that district, although neither the plaintiff nor the defendant resided therein, and although the appointment was coerced by statute. It would not seem difficult, despite the emphasis placed upon "actual consent" in the *Neirbo* decision, to extend the consent of the nonresident defendant to a consent to be considered as present throughout the state for the purpose of litigation. When such extension is made, the logical conclusion is apparent: inasmuch as the presence of the defendant throughout the state would confer jurisdiction over his person upon any court within the state, the service of process would become merely a matter of procedure, for the purpose of giving notice.

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[14]Proceedings Before the Cleveland Institute on the Federal Rules, 205-206.

[15]Restatement, Conflict of Laws (1934) § 74.

[16]308 U. S. 165, 60 Sup. Ct. 153, 84 L. ed. 167, 128 A. L. R. 1437 (1939).

A variation of this argument is that by appointment of an agent within the state for service of process, the nonresident defendant not only "consents" to waive the provisions of the federal venue statute, but also the provisions of Section 503 of the Judicial Code, which provides for service of process only within the district where the process is issued, and which is considered, as is the venue statute, to embody a personal privilege subject to waiver by the defendant.[17]

Criticism of the decision in the *Neirbo* case has been directed not at the result reached, but at the reasoning upon which that result was based, the objection being, in the main, that the application of that reasoning in most cases would result in imputing to the nonresident defendant a "consent" entirely fictional and not in accord with realities, and that such reasoning followed to its logical conclusion, would in many cases lead to an awkward result.[18] Nevertheless, it is believed, should the court see fit to apply the "consent doctrine" to situations arising under this Rule 4 (f), the result would be more desirable than an unreasonable conclusion reached by a rejection of that doctrine.

A non-fictional method by which jurisdiction over the person of the defendant may be established so that Rule 4 (f) becomes merely procedural, is suggested by the language of Mr. Justice Butler in the case of *Hess v. Pawloski*.[19] In that case, involving an injury to a resident by a nonresident motorist, it was said: "In the public interest the state may make and enforce regulations reasonably calculated to promote care on the part of all, residents and nonresidents alike, who use its highways. The measure in question operates to require a nonresident to answer for his conduct in the state where arise causes of action alleged against him, as well as to provide for a claimant a convenient method by which he may be sure to enforce his rights. . . . "[20]

A similar doctrine was applied by the Supreme Court in the case of *Henry L. Doherty & Co. v. Goodman*,[21] involving service of process upon the agent of a nonresident defendant under an Iowa statute similar to the nonresident motorist statute in the *Hess* case. In the *Doherty* case, Mr. Justice McReynolds said: "A nonresident who gets all the benefit of the protection of the laws of this state with regard to the office or agency and the business so transacted ought to be amenable to the laws of the state as to transactions growing out of such business upon the same basis and conditions as govern residents of this state. . . . "[22]

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[17]See Williams v. James, 34 F. Supp. 61, 68 (W. D. La. 1940).

[18]For criticism of the "consent doctrine" in the *Neirbo* case, see Notes 53 HARV. L. REV. 660, 49 YALE L. J. 724. For criticism of the "consent doctrine" in general, see: GOODRICH, CONFLICT OF LAWS (2d ed. 1938) §§ 70-73; SCOTT, FUNDAMENTALS OF PROCEDURE (1922) 47-59; STUMBERG, CONFLICT OF LAWS (1937) 89-90; Cahill, *Jurisdiction Over Foreign Corporations and Individuals Who Carry on Business Within the Territory* (1917) 30 HARV. L. REV. 676.

[19]274 U. S. 352, 47 Sup. Ct. 632, 71 L. ed. 1091 (1927).

[20]274 U. S. 352, 356, 47 Sup. Ct. 632, 633, 71 L. ed. 1091, 1094 (1927).

[21]294 U. S. 623, 55 Sup. Ct. 553, 79 L. ed. 1097 (1935).

[22]294 U. S. 623, 627, 55 Sup. Ct. 553, 554, 79 L. ed. 1097, 1099 (1935).

The decisions in these two cases would indicate a tendency of the United States Supreme Court toward the view that when a nonresident comes into the state for any purpose, that state may, in the interest of the public, require that the nonresident answer in the courts of the state for any cause of action arising out of his conduct while present therein.[23] In other words, the commission of an act within a state, out of which a cause of action arises, empowers that state to acquire a peculiar jurisdiction over the person of the nonresident. The result is that, venue at the residence of the plaintiff being proper and jurisdiction of the defendant existing, service of process under Rule 4 (f) becomes merely a matter of procedure.

It is evident, therefore, that there are divers possible grounds upon which it can be held that Rule 4 (f) is merely procedural, and thus not in conflict with the intentions of Congress as expressed in Rule 82 and the enabling act. That result was undoubtedly the intention of the committee which drafted the Rules of Civil Procedure as shown by their subsequent comments upon the Rules.[24] It is fairly clear also, that this result will be the final one because of the fact that the Supreme Court adopted Rule 4 (f) after the objection to it had been specifically presented; and because of the fact that the present tendency of our federal courts is to simplify their practice and procedure as much as possible, and to abolish to a great extent the complications and technical requirements which have led to anomalous situations and in many cases hindered actual and prompt justice.

R. Brent Forman, Jr.

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[23]This basis of jurisdiction over nonresidents has been thus far recognized only in cases concerning motorists, individuals dealing in securities, and corporations doing business within the state. For arguments that such power should be extended, see Daum, *The Transaction of Business Within a State by a Non-Resident as a Foundation for Jurisdiction* (1934) 19 IOWA L. REV. 421; Ross, *The Shifting Basis of Jurisdiction* (1933) 17 MINN. L. REV. 146; Scott, *Jurisdiction Over Nonresident Motorists* (1926) 39 HARV. L. REV. 563; Scott, *Jurisdiction Over Nonresidents Doing Business Within a State* (1919) 32 HARV. L. REV. 871. See also RESTATEMENT, CONFLICT OF LAWS (1934) § 84.

[24]This is the view of Dean Charles E. Clark and William D. Mitchell (see PROCEEDINGS BEFORE THE CLEVELAND INSTITUTE ON THE FEDERAL RULES 205-206); and of Judge Donworth (see PROCEEDINGS OF WASHINGTON AND NEW YORK INSTITUTE ON FEDERAL RULES 291, 292).

The Mississippi Law of Nuisances

The term nuisance cannot be given a precise, technical definition.[1] Blackstone defined a nuisance as "anything that worketh hurt, inconvenience, or damage."[2] Another writer has said nuisance is "anything wrongfully done or permitted which injures or annoys another in the enjoyment of his legal rights."[3] But these definitions, necessarily couched in broad and general terms, are of little value. Our position is like that of the author who cautioned:

> " . . . 'nuisance' is a good word to beg a question with. It is so comprehensive a term, and its content is so heterogeneous, that it scarcely does more than state a legal conclusion that for one or another widely varying reasons the thing stigmatized as a nuisance violates the rights of others."[4]

Only through study of the individual cases can the nature of nuisances be defined or discussed.

Two general classifications of nuisances may be made, however; and these groupings should be considered before going further. An activity may be classified either as a nuisance *per se* or nuisance in fact. On the other hand, nuisances are either public or private; though one nuisance may combine the characteristics of both.

Mississippi has avoided any classification of a legitimate business as a nuisance *per se*.[5] The attitude seems to be that if an occupation is lawful and by care and precaution can be conducted without danger or inconvenience to another, the occupation cannot be *per se* a nuisance. If such an occupation or business becomes a nuisance, it is through want of proper care or precaution. A nuisance *per se,* then, is one which, be-

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[1]From this general discussion of the Mississippi law of nuisances, certain phases of the subject have been excluded. The cases involving surface waters and natural watercourses, other than the pollution of streams, have not been included. These cases might well be considered in a separate study of that interesting and highly developed field of law in Mississippi; *cf.* Comment (1938) 11 Mississippi Law Journal 436. The so-called "attractive nuisance" cases will not be discussed. A more logical treatment of this doctrine would be had from the point-of-view of duty owned to trespassing children. Also, the question as to when activities of a municipality, or a public utility acting under government approval, or an activity on land acquired by exercise of eminent domain will become a nuisance, as compared to similar activities of a private individual, would best be considered in a separate discussion.

[2]3 Bl. Comm. * 216.

[3]Cooley, Torts (4th ed. 1932) § 399.

[4]Thayer, *Public Wrong and Private Action* in Selected Essays on the Law of Torts (1924) 276, 285, also in (1913) 27 Harv. L. Rev. 317, 326.

[5]There appear to be two conflicting definitions of a nuisance *per se:* (1) "The courts may, without violating any provision of the constitution, declare any particular business as conducted in a locality of a particular character, a nuisance *per se,* as for example, a business which because of its character, would be objectionable if conducted in a residential district." 3 Cooley, Torts (4th ed. 1932) § 405. (2) "Unless the thing itself because of its inherent qualities, without complement, is productive of injury . . . it cannot be said to be a nuisance *per se* at common law." Joyce, Nuisances (1909) § 16.

cause of characteristics inherent within itself, is unlawful and would be a nuisance no matter what its surroundings.[6] All other nuisances, the Court regards as nuisances in fact.[7] The activity is not a nuisance in essence. Whether a nuisance exists is a question of circumstance and degree determined from the facts of each case;[8] a nuisance is found to be present when, due to the surrounding circumstances, or present method of work, or its location, an injury of such kind and intensity results to the public or to individual neighbors as is an unreasonable invasion of their rights.

The difference between a nuisance *per se* and a nuisance in fact has been said to lie in the manner of proof.[9] If a nuisance is one *per se*, it is only necessary to prove its existence. But if the condition is not unlawful in its nature so as to constitute a nuisance *per se,* its character as a nuisance is a question of fact to be shown in each case.

Classification of nuisances as public and private is based upon an entirely different view of the subject. A private nuisance is an injury to property or to the individual's right to enjoy property, and he has an action to protect his interests. In public nuisance, the injury is to a public right or interest affecting the community at large, as the obstruction of a street or highway. An individual, though injured by a public nuisance, has no action for damages unless he shows special injury, distinct in its nature from that of the general populace.[10]

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[6]The Mississippi Court's attitude is apparent in those cases mentioning the problem of nuisance *per se*. See for example, Reber v. Illinois Cent. R. R., 161 Miss. 885, 138 So. 574 (1931); National Refining Co. v. Batte, 135 Miss. 819, 100 So. 388 (1924); Fitzhugh v. Jackson, 132 Miss. 585, 97 So. 90 (1923); Green v. Lake, 54 Miss. 540 (1877). Note that Judge Simrall's reference in the *Green* case to pigpens as unlawful within a city would seem controverted by the cases of Comfort v. Kosciusko, 88 Miss. 611, 41 So. 268 (1906); and *Ex parte* O'Leary, 65 Miss. 80, 3 So. 144 (1887).

[7]It has been maintained that "there are some lawful trades and modes of using property which by universal noxiousness and offensiveness are *prima facie* nuisances." JOYCE, NUISANCES (1909) § 16. No reference to this doctrine has been found in the Mississippi cases.

[8]Anderson, J., in Reber v. Illinois Cent. R. R., 161 Miss. 885, 898, 138 So. 574, 577 (1931) said: "There is no hard and fast controlling rule; for the use under one set of facts might be reasonable, and unreasonable under another . . . . Which facts are often many and varied, such as location, nature of the use, character of the neighborhood, extent and frequency of the injury, the effect on the enjoyment of life, health, and property and the like."

[9]In JOYCE, NUISANCES (1909) § 16, it is said: "The difference between a nuisance *per se* and a lawful business carried on so as to become a nuisance lies rather in the proof than in the remedy." But whether the same remedy is always available is open to serious question. Even though both conditions be adjudged nuisances, under the "balance of convenience doctrine" an injunction would seem much more certainly available in a case of nuisance *per se* than in a case of nuisance in fact. See note 69 *infra*.

[10]3 COOLEY, TORTS (4th ed. 1932) § 447.

I *Private Nuisance*

What Constitutes a Private Nuisance

No Mississippi cases have been found where a private nuisance was held to be a nuisance *per se,* but many legitimate activities have been adjudged nuisances in fact. The duty against invasion or injury by a business or activity which is not itself inherently wrongful is characterized by the maxim, *sic utere tuo ut alienum non laedas*—so use your own as not to injure another's. The doctrine of the maxim cannot, of course, be literally applied. As civilization progresses the uses of property multiply; property rights conflict more and more often. There must be a give and take—balancing of interests—between the man on one hand who would use his property; and the man who will receive injury to his own property or property rights as a result of the other's use.[11] In the recent case of *Williams v. Montgomery,*[12] where the suit was to enjoin a funeral home as a nuisance in a residential district, Judge McGowan said:

> "The older authorities place the emphasis upon the right of the property owner to use his business for a lawful purpose, emphasizing the property right. The modern trend of authority puts stress on the old maxim, 'use your own so as not to injure another's property'."

On the other hand, in *McCutchen v. Blanton,*[13] where an attempt was made to sustain an injunction prohibiting a farmer from planting Johnson grass because it would spread to neighboring plantations, Judge Campbell said:

> "Certainly the complainants . . . have the right to devote their lands to cotton, corn, or other products, and to preserve them for the continued production of such crops. Perhaps the appellant has the same right to devote his land to a valuable and useful grass, even if his doing so shall ultimately cause the adjacent lands of others to be converted into grass-fields, by causes other than his direct agency . . . We are met by conflicting rights. There must be a balancing of them. There should be no restriction of the just right of one further than is necessary to protect another in the enjoyment of his."

A reading of the case will show the Court frowning upon any literal construction of *"Sic utere tuo. . . ."* The trend of thought follows the New York court[14] of that day in giving a liberal construction to a man's right to use his land for lawful purposes—the damages to others, to a great extent, being considered *damnum absque injuria.* As a whole, however, the

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[11]This clash of property interests is discussed in Bohlen, *The Rule in Rylands v. Fletcher* (1911) 59 U. of Pa. L. Rev. 298, at 317.

[12]184 Miss. 547, 556, 186 So. 302, 304 (1938).

[13]59 Miss. 116, 121 (1881).

[14]Judge Campbell quotes extensively from Auburn & Cato Plank Road Co. v. Douglass, 9 N. Y. 444 (1854), in which it is said: "While therefore *sic utere tuo,* etc., may be a very good moral precept, it is utterly useless as a legal maxim."

Mississippi cases, with one possible exception,[15] maintain a fair balance of interest.

This balancing of the interests is most emphasized in determining, not whether an activity is a nuisance in fact, but once it is found to be a nuisance, whether an injunction will lie to abate or whether damages alone will be allowed for the injuries caused.[16] But the problem of balancing the interests is also before the court when it is deciding only whether the conduct amounts to a nuisance in fact.[17] In the case of *American Sand and Gravel Co. v. Rushing,*[18] the language of the Court indicates a possible departure from a true balance of the interests in certain instances in favor of the acting owner. Suit was by the owner of twelve acres of land for injury to the property caused by acceleration of the current in a stream, due to defendant's mining gravel from the creek below the plaintiff's boundary. The decision went off on another point,[19] but the Court first considered the problem as a question of nuisance. The Court reasoned: The mining of gravel is a reasonable use of property. This use often necessarily leaves great ponds, causing accellerated flow of waters, injury from which is *damnum absque injuria*: for otherwise the right to mine gravel is dependent on so many burdensome factors as to make the business intolerably hazardous, retarding development of natural resources. This reasoning seems fallacious; "reasonable use" would seem a question of degree, based upon the amount of injury and interference inflicted by the use upon another's property rights. Under the Court's view in this case, what has happened to the plaintiff's interest and to his property rights? Even in such a case as this, the plaintiff would seem to have a right to damages for injury to the land resulting from a nuisance.[20]

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[15]American Sand and Gravel Co. v. Rushing, 183 Miss. 496, 184 So. 60 (1938); see note 20 *infra.*

[16]See note 69 *infra* concerning the "balance of convenience doctrine."

[17]For a discussion, from one point-of-view, of this question of balancing of interests behind every case of nuisance see Bohlen, *The Rule in Rylands v. Fletcher* (1911) 59 U. of Pa. L. Rev. 298, at 317. See note 27 *infra* for cases illustrating the balance of interests between members of a community as to smoke, odors, and the like.

[18]183 Miss. 496, 184 So. 60 (1938).

[19]An analogy was drawn to the well established right of one to straighten a watercourse on his lands by an artificial channel, as a substitute for drainage of the natural watercourse, of sufficient width and depth to prevent an overflow onto the owner's lands; saying that defendant had, in effect, done nothing more. See comment on the case in (1939) 11 Mississippi Law Journal 436.

[20]Often salt water and waste materials, natural substances coming from oil wells, injure surrounding property. How is such an injury to be regarded in light of the Court's reasoning, especially where there appears no convenient method of disposing of these wastes? It is interesting to note the attitude of the Court in Mississippi Mills v. Smith, 69 Miss. 299, 11 So. 26 (1891) where damages were asked for pollution of a stream by sewage from defendant's plant. In defense the case of Pennsylvania Coal Co. v. Sanderson, 113 Pa. 126, 6 Atl. 453 (1886) was cited. The Court distinguished that case from the question then before them, saying: "But the decision [in the Pennsylvania case] . . . is not that a manufacturing company, more than any other person, may pollute the waters of a stream without liability to others having a right to the use of water flowing therein. On the contrary, the opinion is based upon the express declaration of the court that the character of the

In determining the existence of a nuisance in fact, then, the immediate question is to determine whether the activities complained of are unreasonably injurious in light of the facts and circumstances of the case. One principle factor in deciding whether a use is unreasonable is the character of the neighborhood where the activity is maintained—whether predominantly residential, business or heavily industrial. Though the character of the surroundings is not absolutely controlling, obviously injury to the use of residential property by artificial lights and noise in a filling station might be declared unreasonable,[21] while such interferences would not in a business district. Similarly other activities have been declared nuisances where not in keeping with the general character of the neighborhood.[22] However, the Court has generally condemned the doctrine that one voluntarily "coming to a nuisance" may not complain.[23] The character of the territory is the controlling consideration, unaffected by the fact that one moved to the locality in which the nuisance was situated.[24]

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water had not been changed. The action was by Sanderson against the coal company for polluting the waters of Meadow Brook by discharging therein the waters from its mine. The court said: 'It will be observed that the defendants have done nothing to change the character of the water or its purity, save what results from the natural use and enjoyment of their own property. They have brought nothing on the land artificially. The water, as it poured into Meadow Brook, is the water which the mine naturally discharges. Its impurities arise from natural, not artificial, causes. The mine cannot, of course, be operated elsewhere than where the coal is naturally found, and the discharge is a necessary incident of the mining of it.'" *Id.* at 306, 11 So. at 27. Note the comparison between the reasoning of the Pennsylvania court and that of the Mississippi Court in the *American Sand & Gravel* case.

[21]National Refining Co. v. Batte, 135 Miss. 819, 100 So. 388 (1924).

[22]Davis v. Holmes, 198 So. 25 (Miss. 1940) (proposed erection of funeral home in predominantly residential section enjoined); Williams v. Montgomery, 184 Miss. 547, 186 So. 320 (1938) (injunction granted to abate funeral home existing in residential district); Robertson v. New Orleans & G. N. R. R., 158 Miss. 24, 129 So. 100 (1930) (damages allowed for noise, light, odors, and filth from railroad yards located across street from plaintiff's property in residential section); Buckeye Cotton Oil v. Ragland, 11 F. (2d) 231 (C. C. A. 5th, 1926) (damages allowed and casting of lint and dust upon plantiff's property by cotton oil mill enjoined, where locality was not purely residential in character). But *cf.* Reber v. Illinois Cent. R. R., 161 Miss. 885, 138 So. 574 (1931), where the activity, a railroad roundhouse, was not located in a residential or mixed residential and manufacturing district and the Court refused to hold it a nuisance. In his opinion Anderson, J. said: "The locality is to be considered in determining whether there is a nuisance—what might be a nuisance in one locality might not be such in another. Thus, a business might be perfectly proper in business or manufacturing territory, and a nuisance when carried on in a residential section. . . . " *Id.* at 897, 138 So. at 577.

[23]In Alabama & V. Ry. v. King, 93 Miss. 379, 404, 47 So. 857, 860 (1908), where plaintiff complained of smoke and soot from railroad yards and sidings, Whitfield, J. said: "Announcement that the old rule, maintained by some authorities, that coming to a nuisance will prevent a person so coming from making any complaint, has long since been exploded, is a most wholesome announcement, to which we heartily subscribe."

[24]But see Buckeye Cotton Oil v. Ragland, 11 F. (2d) 231, 234 (C. C. A. 5th, 1926), where Judge Byran's statement may be taken to indicate that the doctrine will be given some weight in certain cases. He said: "Defendant's plant was not located in a district used exclusively for manufacturing purposes. The doctrine of 'coming to a nuisance' does not apply."

Another factor in determining when an act is unreasonably injurious, thus a private nuisance, is the nature of the injury itself. In all cases the injury must be real, not merely feared or imaginary.[25] However, a pending use, from which there is an obvious and threatening injury, denoting it a nuisance if put into operation, may be adjudged and remedied before the happening.[26]

Certain injuries are to be expected and are *damnum absque injuria.* In a town or community, an individual receives many compensating advantages which he must repay by accepting disagreeable encroachments upon his property rights.[27] But where the disagreeableness so affects the sensibilities of a landowner as to injure him unreasonably in the enjoyment of his property or to endanger his health, the conditions are nuisances, and it is not necessary that there be actual injury to the property. These injuries are usually in relation to the individual's right to have the air passing over his land free and unpolluted, approximately in its natural state.[28] The most usual examples are nuisances arising from

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[25]In Thomas v. Calhoun, 58 Miss. 81 (1880), where an injunction was sought for injuries to property and to health from a mill dam, the Court held that as to the alleged unhealthy condition of the residence, the evidence must clearly establish the injury complained of. Interference will be prompt, where health is concerned, but it must be plainly shown that the injury is real and not purely imaginary. Where the evidence leaves the matter doubtful, the court should decline to interpose.

[26]In the recent case of Davis v. Holmes, 198 So. 25 (Miss. 1940), an injunction was granted to prevent erection of a funeral home in a residential district. In Whitfield v. Rogers, 26 Miss. 84 (1853), the chancellor directed to the circuit court to be determined by a jury the question of whether or not a threatened mill dam would constitute a public or private nuisance. Pursuant to the verdict, an injunction was granted prohibiting the erection (this unique procedure would not seem necessary today). But the injury anticipated must be definite and certain of harmful character as well as obvious and impending in happening. See McCutchen v. Blanton, 59 Miss. 116 (1881), where the Court refused to consider proposed planting of Johnson grass a nuisance. The grass was said to have many uses despite its injury to cultivated land.

[27]In the case of Green v. Lake, 54 Miss. 541, 545 (1877), Simrall, J. said: "The complainants prefer to live in a city from motives which induce others to do the same thing in numbers sufficient to constitute a city. Such a community has its advantages and its inconveniences. Of the latter are dust, smoke, noise, and increased risk of conflagration. The elements which make up the city are the noise of machinery, the presence of dust, and air less pure than in the country. . . . 'If a man lives in a town, it is necessary that he should subject himself to the consequences of those operations of trade which may be carried on in his immediate locality, which are actually necessary for trade and commerce, and also for enjoyment of property.'" Similar thoughts were expressed in Mississippi's first nuisance case, Gwin v. Melmoth, 1 Freem. Ch. 505 (Miss. 1842), where a nearby bulding was alleged to obstruct light and air and to create a danger of conflagration.

[28]2 TIFFANY, REAL PROPERTY (1920) § 351.

dust,[29] smoke,[30] and odors.[31] Due to the nature of the intrusions, however, the injuries sustained vary with each case, and the court has great discretion in the determination of whether a nuisance in fact exists.[32]

The right of the landowner with respect to invasions by noise[33] or artificial light[34] may be considered similar to the right in unpolluted air.

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[29]Injuries to health and enjoyment of property caused by dust and lint from a cotton-oil mill in a mixed residential and industrial section of the City of Jackson were found in Buckeye Cotton Oil v. Ragland, 11 F. (2d) 231 (C. C. A. 5th, 1926); and Redmond v. Buckeye Cotton Oil, 277 Fed. 780 (C. C. A. 5th, 1921).

[30]Reber v. Illinois Cent. R. R., 161 Miss. 885, 138 So. 574 (1931) (invasion by smoke, noise, light, and soot held not actionable nuisance, activity being located in industrial neighborhood); Robertson v. New Orleans & G. N. R. R., 158 Miss. 24, 129 So. 100 (1930) (damages awarded for injuries caused by activities of railroad similar to those in previous case, but in a residential district); Alabama & V. Ry. v. King, 93 Miss. 379, 47 So. 857 (1908) (damages recovered for smoke, dust, and cinders from tracks and railroads yards of defendant); King v. Vicksburg R. & L. Co., 88 Miss. 456, 42 So. 204 (1906) (damages recovered for soot and cinders from power plant).

[31]West Point v. Womack, 178 Miss. 808, 174 So. 241 (1937) (sewage emptied into small stream constituted nuisance as result of odor); Hodges v. Drew, 172 Miss. 668, 159 So. 298 (1934) (sewage from city overflowing from septic tank, causing stench, held to create nuisance); Yazoo & M. V. R. R. v. Sanders, 87 Miss. 607, 40 So. 163 (1905) (stench of mule left on railroad tracks after being killed by engine held a nuisance where home rendered untenable).

[32]It is interesting to notice the old case of Gwin v. Melmoth, 1 Freem. Ch. 505 (Miss. 1842). Suit was to enjoin the obstruction of light and air by building of house next to plaintiff's, and erection of chimney exposing his roof to sparks. The chancellor said: "It is true that a party has no right to build a house so near his neighbor as to immediately obstruct the free passage of light or air; but the mere tendency to obstruct the free passage of the one or the other, has never been considered sufficient to warrant the restraining process of a court of equity." *Id.* at 506. The question has never since been before the Court. It is believed, however, that the indication that one might have a natural right to passage of light and air over his land, as against the right of a neighbor to obstruct such passage by building, will be denied in accordance with the general American rule. See 2 TIFFANY, REAL PROPERTY (1920) § 351.

[33]Mississippi Power Co. v. Ballard, 170 Miss. 479, 153 So. 874 (1934) (nuisance from noise alone recognized by the Court, but not sufficient here to be actionable—volume and intensity of noise very slight); Robertson v. New Orleans & G. N. R. R., 158 Miss. 24, 129 So. 100 (1930) (substantial damages given for injury to residential property from nuisance caused by railroad's "private" activities, one of the invading agencies being noise); Dean v. Mississippi Southern Ry., 112 Miss. 333, 73 So. 55 (1916) (noise caused by switch declared *damnum absque injuria,* the switch being used in railroad's "public" functions instead of "private"). The *Dean* case would seem distinguished from Alabama & V. Ry. v. King, 93 Miss. 379, 47 So. 857 (1908) on the ground that in the former case noise alone is complained of, while in the latter case the injuries resulted from physical invasion by deleterious agencies: soot, smoke, and dirt. For a discussion of the last three cases see Comment (1930) 3 MISSISSIPPI LAW JOURNAL 159.

[34]*Cf.* National Refining Co. v. Batte, 135 Miss. 819, 100 So. 388 (1924), where noise and light from filling station, especially headlights of cars as they turned into driveway, were causes of complaint; and Reber v. Illinois Cent. R. R., 161 Miss. 885, 138 So. 574 (1931), where one of the grounds in the bill was annoyance from headlights of locomotive engines at roundhouse.

Certainly whether injuries suffered at the hands of these agents are in fact a nuisance is as much a question of degree as in the case of smoke, dust, odors, and the like.[35]

Somewhat similar to a direct invasion of the senses, and yet unique in the nature of the injury, was the nuisance complained of in *Williams v. Montgomery*[36] and *Davis v. Holmes*.[37] In these cases, funeral homes in residential sections were enjoined. The injury to enjoyment of property would seem primarily through the imagination, through a psychological link.[38]

In the cases of nuisance which have been considered, the question of liability for injury was determined entirely as a matter of degree under the facts of each case. In contrast, there are actions, sometimes treated within the realm of private nuisance, where the injury is an invasion in the nature of a continuing trespass.[39] A typical example is where tree branches extend over a boundary. In these cases the same rule applies as in trespass; the insignificance of the injury is said to go to the extent of the recovery, not to the right of action.[40] Thus, an injunction could not be had in these cases with any greater ease than in other nuisance cases, but at least nominal damages might always be available even though the injuries be more or less trivial.[41]

A few Mississippi cases involve nuisances arising from the pollution of streams. The first, and probably leading case, *Mississippi Mills v. Smith*[42] follows the common law rule[43] that the riparian owner has a

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[35]But see note 33 *supra*. A comparison of the cases of Dean v. Mississippi Southern Ry., 112 Miss. 333, 73 So. 55 (1916) and Alabama & V. Ry. v. King, 93 Miss. 379, 47 So. 857 (1908), indicates that an invasion by deleterious agencies, such as smoke, dust and the like, constitutes a greater injury in the eyes of the Court than disturbance by noise.

[36]184 Miss. 547, 186 So. 302 (1938).

[37]198 So. 25 (Miss. 1940).

[38]For a discussion of this problem see Comment (1939) 12 MISSISSIPPI LAW JOURNAL 262.

[39]In Buckingham v. Elliott, 62 Miss. 296 (1884), the complaint was that the roots of defendant's trees invaded his property, destroying his well. In this category also, due to the nature of the invasion (inundation of lands), are such cases as Rosamond v. Carol County, 101 Miss. 710, 57 So. 979 (1911); and Thomas v. Calhoun, 58 Miss. 81 (1880).

[40]Buckingham v. Elliott, 62 Miss. 296, 300 (1884) (tree roots invading plaintiff's well).

[41]In Thomas v. Calhoun, 58 Miss. 81, 83 (1880), the Court said, refering to flood injuries caused by mill dam to property: "The injury done to the land of the complainants is of a trifling nature, and can be fully compensated by an action at law for damages. The injury is not shown to be irreparable, nor incapable of being removed by building of levees designed to confine the creek within its bed. In such a case, when the business complained of is lawful, and carried on wholly on the land of the defendant, equity will not assume to exercise the delicate duty of preventing by injunction the exercise of the right of ownership by the proprietor." See note 69 *infra*, as to "balance of convenience" or "balance of equities doctrine."

[42]69 Miss. 299, 11 So. 26 (1891) (damages awarded for pollution of stream by sewage from mill).

[43]2 TIFFANY, REAL PROPERTY (1920) § 352.

right to have water come down to him in its natural state and not unreasonably polluted by use of upper proprietors.[44]

After a nuisance is established, the Court has recognized a right in the nature of an easement obtained through prescription by adverse use for the ten year period required by statute to obtain adverse possession of land. However, the right obtained will be limited to the extent of user exercised during the prescriptive period. An increase may be treated as a nuisance.[45]

Remedy

If a private nuisance exists, who may have a remedy? If a nuisance is unlawful conduct unreasonably injuring property of another or his enjoyment of property or his health, then it would logically follow that the owner of the property has the right of action for damages or to abate the nuisance. This ownership need not be a freehold interest; any tendency will be sufficient. But just what the Court will call "tendency" is not definite. In *Reber v. Illinois Cent. R. R.*[46] it was said:

> "The complainant here owns no interest in the real property affected. He is not even a lessee. Nor is he a tenant in the legal sense of the term. He is a mere employee occupant at will, a weekly wage earner, occupying the house as incident to his employment, and as a part of the compensation in consideration of his services. A person must have some estate, be it ever so little, such as that of a tenant at will, or sufferance, to be a tenant. Occupation as a servant, or licensee does not make one a tenant."

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[44]In Masonite Corp. v. Burnham, 164 Miss. 840, 146 So. 292 (1933), the Court infers that the pollution of a stream is a nuisance *per se* as regards the riparian owner; but that as to the non-riparian owner, the question remains one of fact in each case. Anderson, J., said for the Court: "A stream wholly on the land of another which has been polluted by the owner or any other person is not a nuisance per se to one who is not a riparian owner; as to such person it is not a nuisance unless his rights are invaded by the pollution; they may or may not be." *Id.* at 859, 146 So. at 296. In Masonite Corp. v. Dennis, 175 Miss. 855, 168 So. 613 (1936), the above view was urged by counsel for the riparian owner, but the Court held the evidence insufficient to prove pollution of the stream by the defendant. Where the riparian owner does establish pollution of the stream, it is not clear, but would seem, following Judge Anderson's language, that such pollution would be considered a nuisance *per se* as to the riparian owner. Possibly this view can be reconciled with the apparent attitude of the Court toward nuisance *per se,* since at common law, the pollution of a stream is a public nuisance and therefore unlawful, and in every case affects the riparian owner. He has a right to the water in its unpolluted state, while the non-riparian owner has no right to the water as free from pollution unless such condition invades, by odor or otherwise, his right to enjoy property.

[45]In the case of West Point v. Womack, 178 Miss. 808, 174 So. 241 (1937), the defendant sought to establish prescriptive right to manner of disposing sewage, plaintiff complaining of nuisance arising from the custom. The Court said: "A right secured by prescription is limited by the character and extent of that exercised during the period of prescription." *Id.* at 815, 174 So. at 242. See also Mississippi Mills v. Smith, 69 Miss. 299, 11 So. 26 (1891), where there was a similar question involving the pollution of a stream by sewage, defendant claiming prescriptive right.

[46]161 Miss. 885, 900, 138 So. 574, 577 (1931).

In *Hodges v. Drew*[47] husband and wife were plaintiffs to abate a nuisance from an unkept septic tank. The wife owned the legal title to the property; but the husband worked the land, supported his family and paid the taxes, bore any financial loss, and owned all rents and crops. The Court said the husband was not the agent of the wife, but said:

> "In other words, the beneficial interest in the land belonged to him for the use and support of himself and his wife and children."[48]

The Court does not make clear what estate they regard the husband as having in the land beyond his being in "lawful possession."[49] Comparing the Court's language in the *Reber* case and that in the *Drew* case, what is to be taken as the "lawful possession" referred to in the later: One might have "lawful possession" and yet not hold an "estate," either legal or equitable. What estate does the husband have in the latter case? These cases are not easily reconciled; the state of the law seems indefinite.[50] But it may be definitely said that the Court does not follow those authorities whose strict holding is that possession follows the legal title, thus requiring a legal estate before there can be a right of action.[51]

The Court indicates that one who may proceed against the nuisance for injury to property may recover damages or ask abatement where nuisance threatens the health or person of himself or other occupants who are members of his family.[52] But whether recovery will be allowed for injuries to those lawfully in occupation but not members of the family would appear uncertain. Further, whether the action for injury to members of the family could be brought by one other than the landowner himself is not clear.[53]

There are no cases of an action for the creation of a nuisance now

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[47]172 Miss. 668, 159 So. 298 (1935).

[48]*Id.* at 677, 159 So. at 299.

[49]In this connection the Court cites 46 C. J. p. 738, § 318 1/3: "It is now generally held by the courts that lawful possession of land, although unaccompanied by title, is sufficient to support an action for damages for interference with the lawful enjoyment of the premises by the person in possession. A lessee is entitled to recover damages sustained by him during this tenancy from the maintenance of a nuisance which affects his enjoyment and use of the premises."

[50]There are no cases in Mississippi discussing the problem of apportionment between landlord and tenant of the damages recovered by suit of tenant. Would not the question turn on the point as to whether damages recovered are for injury to the property or are for injury to enjoyment of property? See 46 C. J. p. 738, § 318 1/3.

[51]See Cavanagh v. Barber, 131 N. Y. 211, 30 N. E. 235, 15 L. R. A. 689 (1892). The title was owned by the wife; the husband had supported the family for the fourteen years spent in the home. He brought action upon nuisance of fumes from asphalt plant, and the court held that any right of action lay in the wife. Compare this case and the *Drew* case.

[52]Hodges v. Drew, 172 Miss. 668, 678, 159 So. 298, 300 (1935).

[53]Buckeye Cotton Oil Co. v. Ragland, 11 F. (2d) 231 (C. C. A. 5th, 1926) (foster mother allowed to recover damages for minor whose health was impaired by lint and dust from defendant's mill constantly settling on premises). See 46 C. J. p. 738, § 318¼.

maintained by another. However, one continuing a nuisance begun by another would appear liable for all damages.[54]

The fact that the owner acquired his possession after the existence of a nuisance does not bar his right to remedy through injunction or for damages the nuisance might have done after his possession. Coming to a nuisance does not bar the right of action. However, the damages recoverable are restricted to those sustained after the purchase or inheritance under the rule that neither the heir nor the purchaser gets any right of action for a former trespass.[55]

Once an actionable nuisance is adjudged to exist, three methods of remedy are available: (1) Injunction, (2) Damages or (3) Self-help. The party possessing a right of action may move through self-help to physically destroy or remove the nuisance itself, acting at his own risk.[56]

In all cases where nuisance is adjudged to exist, damages, if not an injunction, may be had as relief. There are a few Mississippi cases concerning nuisance where the problem of assessing damages arises. In *Mississippi Mills v. Smith,*[57] damages were recovered for the pollution of a stream. It was held error to allow evidence of the difference in value of the farm with a clear stream and with the stream polluted as the basis for computation of damages. The injuries were declared not to be permanent. They would naturally disappear with the abatement of

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[54]See King v. Vicksburg R. & L. Co., 88 Miss. 456, 488, 42 So. 204, 205 (1906), where it was said: "If the damages to plaintiff's property was not caused by the plant of the defendant since it acquired it, but before, and there has been no continuing cause of damage, whereby depreciation of value has been maintained, there is no liability on it; but if damage was done during the former ownership, and the cause is continued, whereby restoration of value has been prevented, the fact of the former damage would not avail the defendant." 3 COOLEY, TORTS (4th ed. 1932) § 445.

[55]In Masonite Corp. v. Burnham, 164 Miss. 840, 853, 146 So. 292, (1932), where the nuisance complained of was the pollution of a stream, the Court said: "Appellees . . . testified that, when they bought the property, they were unaware of the pollution of the stream and the resulting depreciation in the value of the property. . . . Under the law, appellees purchased the land as they found it, whether they knew of its depreciated value or not. The right of action of their grantor, if any, for the pollution of the stream did not pass to appellee with the conveyance. A purchaser of land after a trespass cannot recover for the trespass." In Thompson v. Philadelphia, 180 Miss. 190, 195, 177 So. 39, 40 (1937), where sewage disposal was said to have damaged property, it was said as to recovery for damages before inheritance: "The evidence tended to show that to a large extent the same conditions existed then that have existed since, and that either the whole or a part of the decrease in the value of the land took place then. . . 'The heir could not, nor could the executor or administrator, under the common law, sue at law for damages done by trespass committed during the lifetime of the ancestor on the lands of the ancestor.'"

[56]Liles v. Cawthorn, 78 Miss. 559, 564, 29 So. 834 (1900). Defendant had destroyed a mill dam which raised the level of the stream destroying his water power for gin and mill. The Court said: "A private nuisance may be abated by any person injured thereby. . . . This redress, like every redress which a party may do for himself, must be exercised reasonably, without strong hand, and must not exceed the measure of right. And is to remove only so much of the dam or obstruction as will free the stream on his own land from refluent water caused by such dam or obstruction." *Id.* at 564, 29 So. at 834.

[57]69 Miss. 299, 11 So. 26 (1891).

the nuisance; therefore prospective injuries might not be assessed.[58] In *Rosamond v. Carol County*[59] a similar problem arose. An embankment was constructed, causing plaintiff's land to overflow. That year plaintiff brought suit for permanent damage to land caused by the standing waters. About nine years later he brought another suit. The Court held that the nuisance was a continuing one, for which successive recoveries in damages could be obtained. Each new overflow supported a new cause of action. Whether plaintiff might have recovered for damages past, present, and prospective under a nuisance of this type, the Court did not decide. But it was held that the allegation of permanent damages did not include those which were prospective, for land might be permanently damaged by each successive inundation.[60]

As to whether punitive damages may be allowed for nuisance, only one case is found in point.[61] Though requested, the defendant railroad had failed to move a dead horse from its premises, making plaintiff's house untenable, and punitive damages were allowed.

In the case of *Masonite Corp. v. Burnham,*[62] the question arose whether two sources, both guilty of nuisance in pollution of a stream, would be considered joint tort-feasors, each liable for the whole damage. Following the holding of an Ohio case,[63] Judge Anderson said:

> "Where different parties discharge sewage and filth into a stream which intermingled and caused an actionable nuisance, they are not jointly liable for damages where there is no common design or concert of action, but each is liable only for his proportion of the damages."[64]

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[58]In this case, if there is a continuance of the nuisance, the Court said, relief must be had through successive actions in light of the temporary nature of the injuries, though there is no guarantee of abatement. In such a case a reasonable question of relief through injunction would seem to be present.

[59]101 Miss. 701, 57 So. 979 (1911).

[60]In neither the *Mississippi Mills* case nor the *Rosamond* case did the Court allow permanent damages. In the first case they were pointedly refused, and in the second case the bill for the first flooding would clearly seem to have asked permanent damages. By declaring in the subsequent suit nine years later that each inundation permanently damaged the land, the Court has thrown aside the consideration of prospective injury in the idea of permanent damages. As was pointedly admitted in the language of the Court in the *Mississippi Mills* case, to refuse to recognize prospective injury leads to a multiplicity of suits in every instance where the nuisance is continued. Prospective damages should be allowed as the only substitute for an injunction. Failing prospective damages, to avoid multiplicity of suits, an injunction would seem a matter of right in each case. See McCormick, *Damage for Anticipated Injury to Land* (1924) 37 HARV. L. REV. 574.

[61]Yazoo & M. V. R. R. v. Sanders, 87 Miss. 607, 40 So. 163 (1905).

[62]164 Miss. 840, 146 So. 292 (1933).

[63]City of Mansfield v. Brister, 76 Ohio St. 270, 81 N. E. 631, 10 L. R. A. (N.S.) 806 (1907).

[64]What would the Court hold under their doctrine of separate liability if both the defendants polluted the stream, but the discharge of neither was sufficient to amount to a nuisance? Compare Prosser, *Joint Torts and Several Liability* (1937) 25 CAL. L. REV. 413, 439.

Injunctions have long been granted by equity to abate nuisances; for, due to the nature of the injury, damages usually are not an adequate remedy. The Court has expressed its caution in allowing injunctions where, though directed toward private nuisances, they would destroy an otherwise legitimate enterprise.[65] But where injunctions have been asked, in only one case[66] has the remedy been refused where a nuisance was adjudged to exist.[67] In all other cases of private nuisance where an injunction was asked and refused, no nuisance was present.[68].

The Court has never recognized or considered directly the doctrine of "balance of convenience," or "balancing the equities," as it is sometimes called.[69] This technique is applied by many courts in denying equit-

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[65]Simrall, J., in Green v. Lake, 54 Miss. 541, 544 (1877) said: "Perhaps the most delicate jurisdiction ever exercised by a Court of Chancery is to restrain, by injunction, the use of property by the owner, on the allegation that such use will be annoying, or injurious to the property of another." Until recently chancery would refuse an injunction against private nuisance until the plaintiff had established his right to relief in a court of law. See Gwin v. Melmoth, 1 Freem. Ch. 505 (Miss. 1842) and Green v. Lake, 54 Miss. 541 (1887). For an interesting case in point see Whitfield v. Rogers, 26 Miss. 84 (1853) where suit was brought to enjoin a proposed mill dam as a nuisance. The chancellor directed to the circuit court the question of whether the completed dam would in fact be a nuisance. See Lewis, *Injunctions Against Nuisances and the Rule Requiring Plaintiff to Establish his Right at Law* (1908) 56 U. of Pa. L. Rev. 289.

[66]In the case of Thomas v. Calhoun, 58 Miss. 81 (1880) the bill alleged overflow of land from mill dam injuring the property and rendering the residence of plaintiff unhealthful. The Court found there was not sufficient evidence to support the allegation of unhealthful condition, but indicated that an injunction would issue if sufficient evidence was produced. The damage to property appeared small, and the Court said the banks of the creek might be raised to keep the water off the land, or the plaintiff might have an adequate remedy at law in damages. It would seem that the Court might have granted a mandatory injunction ordering defendants to so raise the banks of the stream to prevent an overflow.

[67]Davis v. Holmes, 198 So. 25 (Miss. 1940) (proposed erection of a funeral home in predominantly residential district prohibited by injunction); Williams v. Montgomery, 184 Miss. 547, 186 So. 302 (1938) (funeral home already established in a residential district, but built under protest of plaintiffs, enjoined); Learned v. Hunt, 63 Miss. 373 (1885) (obstruction of bayou retarding flow of backwater, restrained); National Refining Co., v. Batte, 135 Miss. 819, 100 So. 388 (1924) (operation of filling station in residential district suppressed where artificial lights and noise invaded privacy of complainant's home, but only if the objectionable features could not be removed); Buckeye Cotton Oil v. Ragland, 11 F. (2d) 231 (C. C. A. 5th, 1926) (throwing of lint and dust in unreasonable or appreciable quantities upon plaintiff's property, enjoined); Redmond v. Buckeye Cotton Oil, 277 Fed. 780 (C. C. A. 5th, 1921) (similar facts).

[68]See Reber v. Illinois Cent. R. R., 161 Miss. 885, 138 So. 574 (1931); McCutchen v. Blanton, 59 Miss. 116 (1881); Thomas v. Calhoun, 58 Miss. 81 (1880); Gwin v. Melmoth, 1 Freem. Ch. 505 (Miss. 1842).

[69]Certainly there is always a balancing of interests and property rights between the acting and damaged owner in determining when an activity is in fact a nuisance. If this were not so, the slight injury to another's right would be actionable under *"Sic utere tuo. . . . "* The "balancing of equities" or "balance of convenience" referred to here has another meaning. As has been said: " . . . a distinction must be drawn between a determination that, as a matter of law, the right of an individual to the undamaged enjoyment of his property is superior to the right of an owner of an adjacent tract to conduct thereon a lawful business the consequence of which would be to injure the enjoyment of the former, and a determination, as a matter of discretion, that the injury to the plaintiff, including consideration of his legal right

able relief though a nuisance has been adjudged to exist and the remedy at law appears inadequate. The question has never been before the Mississippi Court, but kindred thought may be found in the language of *Reber v. Illinois Cent. R. R.*[70] where it was said:

> "An injunction to restrain a lawful business, on the ground that it was so conducted as to render it a nuisance, should never be granted, unless a clear legal right has been invaded resulting in permanent and serious injury, which cannot be adequately redressed by an action at law. And especially is this true when the allowance of the writ will inflict upon the defendant a much more serious injury than the complainant has sustained. . . . The public welfare requires that industry have some abode where it can function freely and without molestation."[71]

When an injunction is granted to restrain the activity resulting in nuisance, the Court will, whenever possible, enjoin only the injurious phase of the enterprise, thus destroying the nuisance without restraining alto-

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to unimpaired enjoyment, outweighs the injury the injunction would inflict on defendant or the public." McClintock, *Discretion to Deny Injunction Against Trespass and Nuisance* (1928) 12 MINN. L. REV. 565, 576. Thus, after an actionable nuisance has been adjudged to exist, some jurisdictions, arguing that where much greater injury or inconvenience is to result from the injunction than from the continuation of the nuisance, refuse the plaintiff relief in equity and allow monetary damages instead. The argument is that a judgment for damages in this class of cases is a matter of absolute right, where injury is shown; but a decree from an injunction is a matter within the sound discretion of the court, to be granted or withheld as that discretion shall dictate, after a full and careful consideration of every element appertaining to the injury. The practical result is that the weaker party is forced to sell his property rights at the price of damages set by the court. Two leading cases which recognize the "balance of convenience doctrine" are: Madison v. Ducktown Sulphur, Copper & Iron Co., 113 Tenn. 331, 83 S. W. 658 (1904) ("sulphurets" and smoke from open copper smelting were destroying vegetable matter for miles around, but an injunction was denied the complainants); Smith v. Satso Milling Co., 18 F. (2d) 736 (C. C. A. 2d, 1934) (injuries from pollution of stream, dust and blasting). On the other hand some courts have pointedly refused the doctrine; see *e.g.*, Hulbert v. California Portland Cement Co., 161 Cal. 239, 118 Pac. 928, 38 L. R. A. (N.S.) 436 (1911) (escape of great quantities of cement and limestone dust enjoined; the court said: "To permit the cement company to continue its operations, even to the extent of destroying the property of the two plaintiff's and requiring payment of the full value thereof, would be, in effect, allowing the seizure of private property for a use other than a public one—something unheard of and totally unauthorized in the law"); Whalen v. Union Bag & Paper Co., 208 N. Y. 1, 101 N. E. 805 (1913) (pollution of stream by paper mill which represented a $1,000,000 investment enjoined by riparian owner of 255 acre farm; factory eventually forced to cease operation altogether).

[70]161 Miss. 885, 898, 138 So. 574, 577 (1931).

[71]But *cf.* Mississippi Mills v. Smith, 69 Miss. 299, 11 So. 26 (1891), where the defense was partly based on the principle that in view of the character of defendant's business, the right of an individual to have pure water must yield to the policy of the state and public of encouraging great manufacturing establishments, which cannot exist without befouling the water. The Court simply said a manufacturer had no more right to pollute a stream than "any other person."

gether the operation of the business.[72] As stated by Judge Simrall in *Green v. Lake*:[73]

> "A perpetual injunction against the lawful use of property . . . ought not to be decreed if the owner can apply to his steam power and machinery such alterations and appliances as will relieve them from the special and unusual annoyances complained of in this case. A Chancellor ought to be well satisfied . . . that there is no remedy short of the cessation of such use before he will abate it as a nuisance by injunction. . . . If the grievance can be removed by the aid of science and skill, a court of equity will go no further that to require those things to be done."

II. *Public Nuisance*

What Constitutes a Public Nuisance

Few cases have arisen in Mississippi where activities have been adjudged public nuisances other than those so declared by statute. There are several cases of public nuisance based on obstruction of a public way.[74] Other nuisances, not arising directly from injury to a specific public right, but which injure the community or group at large have also been considered public nuisances.[75]

Many acts or conditions have been declared public nuisances by legislation. Any use of property, either real or personal, in connection with a place where lewdness, assignation, or prostitution exists gives rise to a public nuisance.[76] The use of property in connection with the sale

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[72]National Refining Co. v. Batte, 135 Miss. 819, 100 So. 388 (1924) (operation of service station enjoined in residential district, but restraint to be entire only if it could not be operated in such a manner as to remove the objectionable features; favorable consideration was promised a plea or answer showing possible method for harmless use of property as filling station); Buckeye Cotton Oil v. Ragland, 11 F. (2d) 231 (C. C. A. 5th, 1926) (throwing lint and dust onto property in unreasonable quantities enjoined and machinery ordered installed and operated to reduce the invasion to quantity directed by the court); Redmond v. Buckeye Cotton Oil, 277 Fed. 780 (C. C. A. 5th, 1921) (similar holding).

[73]54 Miss. 540, 546 (1877).

[74]Covington County v. Collins, 92 Miss. 330, 45 So. 854 (1908) (continuous running of traction engine on highway held an obstruction dangerous to traveling and a public nuisance); Pascagoula Boom Co. v. Dixon, 77 Miss. 587, 28 So. 724 (1900) (boom placed across navigable stream); Canton Cotton Warehouse Co. v. Potts, 69 Miss. 31, 10 So. 448 (1891) (obstruction of city street).

[75]Green v. Lake, 54 Miss. 540 (1877) (wide-spread injury from smoke, sparks, and cinders combined with danger of conflagration held a public nuisance); Whitfield v. Rogers, 26 Miss. 84 (1853) (proposed mill dam enjoined as public nuisance endangering the health of the public).

[76]Miss. Code Ann. (1930) c. 53. In the only case brought under this chapter [Dickerson v. State *ex rel.* Monoghan, 159 Miss. 83, 132 So. 88 (1930)] it was held that a temporary injunction as provided by statute could only enjoin the particular nuisance complained of in the bill.

or possession of whiskey is a public nuisance, and such use may be abated.[77] A similar statute refers to keeping or display of gambling equipment.[78] Two other recent statutes declare a use of property in connection with violation of laws regulating sale and tax of gasoline[79] or any place where narcotics are kept or used[80] to be a public nuisance. The advertisement of intoxicating liquor has also been declared a public nuisance by statute.[81]

These statutory nuisances are antedated by that provision of the Code giving chancery courts power to suppress as a public nuisance any place or business where one sells malt, vinous, or spirituous liquors.[82] This statute would seem to have been suggested by the Volstead Act of 1906. Congress realizes Prohibition would be difficult to enforce, and extra teeth were added to the bill by declaring saloons and similar dispensaries to be unlawful and public nuisances.[83]

The legislative enactments of public nuisances referred to above have all dealt with admittedly unlawful acts or conditions resulting from use of property in violation of law. However, under the police powers, the legislature may prohibit any conduct or use of property which may be injurious to health, peace or safety. This power of regulation need not be exercised directly by the law-making body; usually it is delegated to the municipalities.[84] The power is to enact ordinances under which to proceed, not to condemn or abate an nuisance without legal trial.[85]

What activities may a municipality declare to be a public nuisance? An ordinance classing as nuisance all manufactories and similar constructions of wood with defective boilers and machinery, which become dan-

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[77]Miss. Code Ann. (1930) § 125. This section is not to be confused with the more harsh provisions of the chapter referring to prostitution. In Pigford v. State *ex rel.* Broach, 184 Miss. 194, 200, 183 So. 259, 260 (1938), where, under the statute referring to prostitution, an injunction was sought not only against the sale or use of property in connection with the sale of liquor which might have been had under Section 125 but also against operation of the business in its legitimate phases, the Court said: "The legislature did not deal so drastically with intoxicating liquor cases as with those pertaining to prostitution, and the two acts are not in *pari materia,* and cannot be read one into the other." Other cases brought under the statute: Pigford v. State, 188 So. 295 (Miss. 1940); Kent v. State, 186 So. 312 (Miss. 1939); Carvella v. State *ex rel.* Holcomb, 185 Miss. 1, 186 So. 653 (1939); Redding v. State, 184 Miss. 371, 185 So. 560 (1939).

[78]Miss. Code Ann. (Supp. 1938) § 503, see Carvella v. State *ex rel.* Holcomb, 185 Miss. 1, 186 So. 653 (1939).

[79]Miss. Code Ann. (Supp. 1938) § 1261.

[80]Miss. Code Ann. (Supp. 1938) § 292.

[81]Miss. Code Ann. (1930) §§ 2025, 2026.

[82]Miss. Code Ann. (1930) §§ 2000, 2001.

[83]See Chacon, *Abatement of Liquor Nuisances Under the Volstead Act* (1925) 11 A. B. A. J. 663; and Shabaz, *The Historical Development of the Power of Equity Courts to Enjoin Nuisances* (1926) 11 Marq. L. Rev. 32.

[84]The powers are granted either specifically in the charter of the municipality or generally under Miss. Code Ann. (1930) §§ 2396, 2406. Under these sections the mayor and board of aldermen are delegated police powers to prevent, remove, and abate nuisances. These statutes are not to be confused with the zoning ordinances.

[85]Lake v. Aberdeen, 57 Miss. 260 (1897) (ordinance provided for declaring nuisance on petition to mayor of injury).

gerous to persons or property, was held to be within the granted police power.[86] General regulations prohibiting keeping of hogs within city limits have been held invalid, for hogs might or might not, under different conditions, constitute a nuisance in a city.[87] Where the owner of a skating rink obtained an injunction to prevent enforcement of a ordinance regulating hours and suppressing business as a public nuisance, the Court said:

> "Skating rinks and such like can be suppressed only when as a fact they become nuisances, and when they are regulated it must be in a reasonable manner."[88]

Thus the police power of municipalities (and the legislature[89]) to declare acts or conditions public nuisances was practically non-existant in the eyes of the Court. Only when the condition was inherently unlawful might it be prohibited absolutely as a public nuisance. In all other cases, the regulation would seem restricted to provisions for procedure and to provisions setting out the characteristics of a public nuisance;[90] nuisance under the ordinance remains a question of fact in each case.[91]

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[86]Green v. Lake, 60 Miss. 451 (1882).

[87]Comfort v. Koscuisko, 88 Miss. 611, 41 So. 268 (1906); and *Ex parte* O'Leary, 65 Miss. 80, 3 So. 144 (1887).

[88]Johnson v. Philadelphia, 94 Miss. 34, 47 So. 526 (1908). It is interesting to note that in Crittenden v. Booneville, 92 Miss. 277, 45 So. 723 (1908), the owner of a poolroom obtained an injunction prohibiting the enforcement of an ordinance declaring all pool halls public nuisances and unlawful. He was sustained on the ground that there was nothing wrong *per se* in the operation of a poolroom, and that the ordinance acted to destroy property rights. The fact that the legislature had recognized pool halls as a legitimate business was said to be evidenced by provisions allowing licenses to issue for their operation. But in Corinth v. Crittenden, 94 Miss. 41, 47 So. 525 (1908), a similar ordinance was declared uninforceable since the city had been given special powers by the legislature in its charter to suppress poolrooms. In Quintiny v. Bay St. Louis, 64 Miss. 483, 1 So. 625 (1886), the Court said that where the question of unreasonable injury depends upon the facts and circumstances under which the activity operates, the legislature can not conclusively determine the effect to be harmful. Then the *Corinth* case can only be explained on the theory that the legislature has provided for the licensing of what had been considered, and is today, a nuisance *per se;* but that the legislature having recognized the same by allowing licenses to be sold, the municipality, as a mere creature of the legislature, cannot condemn that which the legislature has recognized. But the provision in Corinth's charter, antedating the licensing statute, will stand.

[89]In Quintini v. Bay St. Louis, 64 Miss. 483, 1 So. 625 (1886), it was held that where questions of injury depend upon the facts and circumstances under which the activity operates, the legislature cannot conclusively determine the effect to be harmful. If it might, then the legislature would be assuming judicial functions.

[90]Provisions such as those in the ordinance set out above refer to manufactories with defective machinery "which becomes dangerous to persons or property." Surely, there is still the question under the statute of whether the condition has "become dangerous."

[91]In Desparte v. Biloxi, 136 Miss. 542, 100 So. 387 (1924), which dealt with an ordinance declaring all oyster packing plants of a certain type nuisances, the Court said. "We simply hold that under our statute a municipality has no authority to prohibit any condition on the ground that it is a nuisance and inimical to the public health, unless in truth and in fact the evidence shows it is such a nuisance." *Id.* at 549, 100 So. at 388. See Vinsel, *Powers and Functions of Municipal Corporations* (1933) 5 MISSISSIPPI LAW JOURNAL 168, 181.

Then came the zoning laws, provisions for municipal control, under legislative sanction, of building regulations within cities and towns. The Court's attitude toward municipal declarations of nuisance is reflected in *Fitzhugh v. Jackson*[92] where early zoning ordinances were declared unconstitutional. However, the present general zoning statutes[93] were adjudged sound in the case of *Jackson v. McPherson,*[94] which did not overrule expressly, but circumvented, *Fitzhugh v. Jackson.*[95] And, though the attitude of the Court toward municipal ordinances perhaps remains unchanged,[96] a new but related method of approach, based upon an expansion of the police powers, has been opened to the municipality in form of legal and binding zoning requirements.

Remedy

A public nuisance concerns the people generally. Right to abate the nuisance lies in the government,[97] which acts through its proper officials.[98] A private individual who has suffered special injury from a public nuisance may bring an action for abatement[99] and proceed as if the nuisance or

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[92]132 Miss. 585, 97 So. 90 (1923).

[93]Miss. Code Ann. (1930) §§ 3474, 2481, as amended Miss. Code Ann. (Supp. 1938) § 199.

[94]162 Miss. 164, 138 So. 604 (1931).

[95]132 Miss. 585, 97 So. 90 (1923).

[96]The Court's recognition of zoning ordinances was based upon an expansion of the police powers, and may well indicate a more liberal view in the future toward municipal declarations of public nuisances. In Jackson v. McPherson, where the zoning statutes were upheld, Judge Griffith said: ". . . We are conscious of, and give due consideration to, what we believe to be the fact that had this same statute been before this court twenty years ago, or perhaps even at a later period, the answer would probably have been the opposite to what we give today." 162 Miss. 164, 174, 138 So. 604 (1931).

[97]By statute private individuals may bring suit in behalf of the state to abate a public nuisance. See Caravella v. State *ex rel.* Holcomb, 185 Miss. 1, 186 So. 653 (1939). See also Miss. Code Ann. (1930) c. 53 (prostitution); Miss. Code Ann. (Supp. 1938) § 125 (place where liquor possessed); Miss. Code Ann. (Supp. 1938) § 503 (gambling equipment).

[98]Where public officers have refused to act, may a group of associated citizens standing together bring suit? Would it appear possible that a suit might be had by an individual other than under the statutes? There is no case in Mississippi in point, but in McKee v. Hogan, 145 Miss. 747, 766, 110 So. 775, 779 (1927), where plaintiff sought an injunction to prevent trustees from buying land for a new school, the Court said: " . . . before a private citizen can resort to injunction to litigate public questions, he should show that he has applied to the proper parties without redress, and also that he invited other citizens to join him in the litigation." But see Pomeroy, Equity Jurisprudence (2d ed. 1919) § 1892, where the right to individuals is said to be denied unless provided by statute.

[99]Pearman v. Wiggins, 103 Miss. 4, 60 So. 1 (1912) (machinery in open space used as public way, alleged special injury being interference with shipping entrance and with customers getting to store); Pascagoula Boom Co. v. Dixon, 77 Miss. 587, 28 So. 724 (1900) (public nuisance of obstruction to navigable stream enjoined in private suit, special injury to plaintiff in that boom prevented passage of log rafts to saw mill); Canton Cotton Warehouse Co. v. Potts, 69 Miss. 31, 10 So. 448 (1891) (demurrer to bill seeking injunction against closing of street overruled since plaintiff suffered special damages, all her customers being denied access to her place of business); Whitfield v. Rogers, 26 Miss. 84 (1853) (private injunction against anticipated public nuisance to community health on special damages threatened to timber and lands).

that part specially injuring him, was alone a private nuisance. But the individual has no right of action unless specially injured. Special injury in Mississippi has been defined as injury to the individual peculiar in its nature from that suffered by the general public.[100]

To maintain a public nuisance is a misdemeanor, a crime, for which an indictment will lie to abate the condition and to punish the offenders.[101] Equity has for many years, however, taken jurisdiction to restrain certain public nuisances, such as purprestures and threats to public health; but generally, with these exceptions, the jurisdiction has lain dormant since the fifteenth century.[102] In recent years, especially since the Prohibition laws characterized by the Volstead Act of 1906, injunctions at equity have been drafted by statute to suppress as public nuisance the sale of liquor, places of prostitution, gambling houses, and the like. This jurisdiction of equity was widely questioned, and many injunctions were attacked as unconstitutional.[103] The test came in Mississippi under one of our early prohibition statutes similar to the present provision of Section 2001 of the Code of 1930. *State v. Marshall,*[104] decided in 1911, declared that this section did not confer on the equity court any jurisdiction to entertain criminal prosecution, nor did it take property without due process of law, nor deprive defendant of the right to trial by jury. Chief Justice Mayes said for the Court:

> "The right to enjoin a public nuisance is no new subject of equitable jurisdiction. 4 Pomeroy, 1349. By the act the unlawful sale or gift of intoxicating liquors is declared to be [a public nuisance], and it was clearly within the constitutional power of the legislature to so declare. Because a person may be prosecuted criminally for maintaining a public nuisance this fact cannot prevent the right of an equity court to enjoin, and particularly when the law expressly gives that right. . . . When a business is a public nuisance, no matter how it gets to be such, whether inherently so or made so by law, the court of chancery has power to enjoin."[105]

Today in Mississippi a court of equity has full jurisdiction[106] to restrain

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[100]The Court has said that damages of greater degree than those suffered by the public are not special; they must be distinct and different from those suffered generally. "The complainant must sustain a special or peculiar damage,—an injury distinct from that done to the public at large. . . . On account of his proximity to the obstruction, the plaintiff may suffer more in degree but not different in kind from others." Simrall, J., in Green v. Lake, 54 Miss. 540, 545 (1877).

[101]STORY, EQUITY JURISPRUDENCE (14th ed. 1918) § 1250.

[102]See Shabaz, *The Historical Development of the Power of the Equity Courts to Enjoin Nuisances* (1926) 11 MARQ. L. REV. 32.

[103]Chadon, *Abatement of Liquor Nuisances Under the Volstead Act* (1925) 11 A. B. A. J. 663; Olmstead, *Padlock Injunctions* (1925) 11 A. B. A. J. 389.

[104]100 Miss. 626, 56 So. 729 (1911).

[105]*Id.* at 640, 56 So. at 795.

[106]It should be noted that Redmond v. State *ex rel.* Att'y General, 152 Miss. 54, 118 So. 360 (1928) denies equitable relief against public nuisances where procedure for abatement through the circuit court is provided by statute. See also Morris v. Columbia, 184 Miss. 342, 186 So. 292 (1938).

public nuisances.[107]

Walter R. Bridgforth

The "Theory of the Case" in Mississippi

Under the system of pleading at the English Common Law, it was necessary for the plaintiff to state his case so that it would fall under one of the forms of action which the clerks of chancery could furnish to him. There were only as many rights of action as there were forms of action. Today most of the states have abolished the necessity of bringing suit under the technical forms as they were known at common law. In Mississippi, Section 521 of the Code of 1930 provides: "The declaration shall contain a statement of the facts constituting the cause of action, in ordinary and concise language, without repetition; and if it contain sufficient matter of substance for the court to proceed upon the merits of the cause, it shall be sufficient; and it shall not be an objection to maintaining any action that the form thereof should have been different." In some form or other this section goes back to the time that Mississippi was a territory; in the present form it dates from the Code of 1880.[1]

It has been expressly held that this section abolishes forms of action as they existed at common law.[2] This has been the construction given similar statutes in other states, and the result is that it is no longer necessary to make the declaration conform to the common law forms of action. However, in many of the states that have set up systems of code pleading, it has been held that the plaintiff must still formulate a *theory* of his case and stick to that theory throughout the trial. If the theory which the plaintiff had selected would not grant him relief, but another theory would, he was in the same position that he would have been at common law if he had selected the wrong form of action.[3] Other states have taken a more liberal view as to the construction of this statutory provision and have held that the plaintiff need be concerned only with the statement of the facts and not with an indication of

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[107]For cases where public nuisances have been enjoined in Mississippi in suits by public officials rather than by private individuals, see Covington County v. Collins, 92 Miss. 330, 45 So. 854 (1908), cited *supra* note 71; Green v. Lake, 60 Miss. 451 (1882), cited *supra* note 86; and the cases cited *supra* notes 73, 74.

[1]Miss. Ty. Dig. Laws (Toumlin, 1807) § 35; Miss. Code (1824) c. 13 § 89; Miss. Code (Hutchinson, 1848) c. 61, §§ 89, 90; Miss. Rev. Code (1857) c. 61, § 9, Arts. 78, 86; Miss. Rev. Code (1871) §§ 576, 577; Miss. Rev. Code (1880) § 671; Miss. Rev. Code (1906) § 729; Miss. Code (Hemingway, 1917) § 512.

In the Miss. Laws 1850, c. 4, there was established a complete system of code pleading in this state. It was short-lived, however, the Code of 1857 going back to the common law system, with a few statutory changes.

[2]Gibson-Moore Mfg. Co. v. Meek, 71 Miss. 614, 15 So. 789 (1893).

[3]Euler v. Euler, 55 Ind. App. 547, 102 N. E. 856 (1913); McKinley v. Briton, 55 Ind. App. 21, 103 N. E. 349 (1913); see Note (1914) 50 L. R. A. 3; Albertsworth, *The Theory of the Pleadings in the Code States* (1922) 10 Calif. L. Rev. 202; Clark, *The Complaint in Code Pleading* (1926) 35 Yale L. J. 259.

the theory upon which he is basing his grounds of recovery.[4] What view does Mississippi take?

The first case of importance to come up in this state was the case of *New Orleans, J. & G. N. R. R. v. Hurst*[5] in 1859. In this case a passenger who had been taken past his station brought suit for damages. The declaration was worded in terms which seemed to indicate that the plaintiff was proceeding upon the theory of contract, and no special damages were proved by the plaintiff on the trial. The jury awarded damages in the amount of $4,500; and in affirming the judgment, the Supreme Court said that this verdict might be sustained upon the theory that the action was really a tort action. They stated that the factors which they would consider in determining the theory upon which the plaintiff was proceeding were first, the character of the remedy such facts indicated; and second, the most complete and ample redress which, upon the facts stated, the law can afford. Thus we have the Court evolving the theory of recovery that will best suit the plaintiff even though the declaration drawn by the plaintiff seemed to have proceeded upon a different theory. This case was decided under the system of code pleading that was set up in this state in 1850,[6] but due to the liberal construction placed upon Section 521 of the Code of 1930 it would probably be followed today.

After the Code of 1857[7] abolished the system of code pleading that had been attempted, there were a few liberal cases decided by the Court.[8] On the whole, however, there appears to have been a retrogression. During this period the Court had a number of cases to come before it in which it was necessary for it to decide whether the true basis of the action was tort or contract in order to determine whether or not a recovery could be had.[9] In these cases the Court stated that the plaintiff could not bring his action on one theory in order to get the benefit of favorable code sections when he had no possibility of a recovery on that theory.

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[4]Crowder v. Fordyce Lumber Co., 93 Ark. 392, 125 S. W. 417 (1910); Kunz v. Ward, 28 Kan. 93 (1882); Simpson v. Bantley Realty Co., 142 Mo. App. 490, 126 S. W. 999 (1910); Raymond v. Blancgrass, 36 Mont. 449, 93 Pac. 648 (1908); Graham v. Graham, 134 App. Div. 777, 119 N. Y. Supp. 1013 (Sup. Ct. 1909).

[5]36 Miss. 660, 74 Am. Dec. 785 (1859).

[6]Miss. Laws 1850, c. 4.

[7]Miss. Rev. Code (1857) c. 61, § 9.

[8]In Lamkin v. Nye, 43 Miss. 241 (1870), for example, the declaration was drawn so as to proceed upon the theory of assumpsit, when debt should have been relied upon. The Court said that the facts would determine which theory plaintiff was relying upon, and his attempt to prove his case on a wrong theory would not prevent a recovery.

[9]Gulf & S. I. R. R. v. Wells Lumber Co., 111 Miss. 768, 72 So. 194 (1916); Illinois C. R. R. v. Andrews, 61 Miss. 474 (1884); Mississippi C. R. R. v. Fort, 44 Miss. 423 (1870). In these cases the plaintiffs were damaged by the negligent operation of the railroad, and in framing their declarations, they stated their cases in the form of an action on open account in order that they might take advantage of the statutes allowing default judgments on actions founded on a writing or on open accounts when an affidavit was attached. In each of the cases, the cause of action was clearly one of tort, and the action should have been brought on that theory. It was clear that the code sections giving the right to a default judgment were not intended to cover this type of situation.

In the case of *Hazlehurst v. Cumberland Tel. & Tel. Co.*[10] the Court laid down a rule that indicated that it was becoming more strict in its view. In that case the plaintiff was not sure upon which theory his case should proceed, and he drew up his declaration stating his cause of action in two counts. Even though both counts stated causes of action arising out of the same transaction, one proceeded upon the theory of an action *ex delicto* and the other upon the theory of an action *ex contractu*. The Court held that the plaintiff had attempted to join in one declaration two inconsistent causes of action and that his declaration was subject to a general demurrer. Judge Calhoon said:

> "The first count of the declaration is on a cause of action distinctly *ex contractu*. The second is one distinctly *ex delicto*. Here is, therefore, a misjoinder of causes of action, and a general demurrer to the whole declaration was properly sustained. Chitty's Pl. (16th ed.) 228. Our code does not change this."[11]

Even more strict was the case of *Illinois Central R. R. v. Abrams*.[12] Here the Court held that a plaintiff could not state in his declaration in one count facts that would be grounds for recovery at common law and also grounds for recovery under Section 193 of the Constitution of 1890. The common law liability was founded on the theory that defendant had failed to furnish the plaintiff a safe place to work and the liability sought under this constitution section was on the theory that the negligence of a fellow servant was the cause of the injury. According to the Court, an attempt to base the liability of the defendant upon these two theories was "reversible error . . . plainly and flagrantly."[13] This case seems to say that it will be necessary for a plaintiff to decide whether he is going to sue on the common law theory or on the theory of liability created by the Statute, and that having picked the theory upon which he is going to proceed, he must stick to it. He cannot, apparently, merely state the facts which would allow recovery under either theory and then allow the court to decide the best basis for a recovery. The holding in the *Abrams* case was strengthened by the case of *Yazoo & M. V. R. R. v. Wallace*[14] in which case the Court sustained a demurrer to a declaration that stated facts similar to those in the *Abrams* case, and stated that the plaintiff could not join in one count, common law causes as to unsafe ways and appliances with causes arising from the negligence of fellow servants under Section 193 of our Constitution, saying that they were inconsistent.

In the case of *Home Insurance Co. v. Tate Mercantile Co.*[15] the plaintiff was evidently afraid to risk stating his facts in one count after the decisions of the Court pointed out above In this case the plaintiff

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[10] 83 Miss 303, 35 So. 951 (1903).
[11] *Id.* at 307, 35 So. at 952.
[12] 84 Miss 456, 36 So. 951 (1904).
[13] *Id.* at 464, 36 So. at 952.
[14] 90 Miss. 609, 43 So. 469 (1907).
[15] 117 Miss. 760, 78 So. 709 (1917).

owned a business upon which the defendant insurance company had issued a policy of fire insurance. The business was destroyed by fire. Plaintiff filed a claim for loss as provided by the policy; but due to failure of the defendant promptly to pay the amount of the loss, the plaintiff was forced into bankruptcy by his creditors. Plaintiff filed his declaration in two counts, one founded on the theory of contract, asking for damages for the amount due under the policy, and the other founded upon the theory of tort liability, asking for damages because of the failure of the defendant promptly to pay the amount due under the policy. The defendant demurred on the authority of *Hazlehurst v. Cumberland Tel. & Tel. Co.*;[16] plaintiff confessed the demurrer and struck out the tort count and proceeded to trial on the other one. After recovery on the first count, plaintiff brought a separate suit based upon the second count. The Court held, however, that the first action was *res adjudicata.* Perhaps the plaintiff would have been entitled to complete relief if he had merely stated the facts and not attempted to evolve the theories for the court. However, after a study of the cases that had gone before him, it is easy to understand why he took the course he did.

Beginning in 1938 with the case of *Southeastern Express Co. v. Namie*[17] the Court definitely took a more liberal view. In this case the plaintiff delivered certain skunk pelts to the defendant to be transported to St. Louis. It was alleged and proved that the goods were properly packed and in good condition when delivered to the defendant; and it was undisputed that when delivered to the consignee, a number of the pelts were so badly damaged as to be entirely worthless. Plaintiff charged that the defendant "negligently caused said furs to be placed upon and in close proximity to the hot steam pipes . . . and negligently permitted the furs to remain in that situation and exposed to a high degree of heat for a period of several hours." On the trial the plaintiff failed to prove the specific negligence charged and defendant insisted that it was entitled to a directed verdict. Its argument was that since plaintiff had gauged his legal battle on the issue of negligence, as the gist of his cause of action and had failed to sustain that issue, defendant was entitled to a verdict. The Court allowed the plaintiff to recover on the theory of contract, saying that he had proved a case which entitled him to recover on that theory even though his declaration and argument were based upon the theory of tort. Judge Griffith stated:

> "Under our statutes abolishing forms of action and requiring that merits only shall be considered, Sec. 521, Code of 1930, the rule goes so far that a recovery may be had in contract, if the allegations and proof support such a right, although the declaration sounded in tort."[18]

This liberal view was followed in the case of *Lancaster v. Jordan Auto*

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[16]See note 10 *supra.*
[17]182 Miss. 447, 181 So. 515 (1938).
[18]*Id.* at 460, 181 So. at 517.

Co,[19] and the case of *Illinois Central R. R. v. Paxton.*[20] These three cases indicate that the Court is going back to the holding announced in the *Hurst* case and that under this liberal construction of the statute, the plaintiff need not evolve a theory upon which he is basing his right to recover, but may state his facts and allow the court to place his case in the theory which will allow him recovery.

Just how far these later cases have modified the earlier conservative cases is not entirely clear. It seems certain that the rule that a count in contract and one in tort cannot be joined will stand, but just how much further the Court will go in its liberal view remains to be seen.

An attorney who has a case in which he is doubtful as to the best theory upon which to base his cause of action, should profit by the lesson taught by these last three cases. He should not attempt to state his cause in several different ways on the chance that he will state it right in one of the counts, but should merely put his facts down in a logical and clear manner without attempting to characterize them by legal conclusions. After all, this is merely doing what the statute says to do. The statute tells him to state "the facts constituting the cause of action, in ordinary and concise language, without repetition; and if it [the declaration] contains sufficient matter of substance for the court to proceed upon the merits of the cause, it shall be sufficient." So long as the statute is construed in the manner in which the later cases indicate that it will, we will have in Mississippi a practice similar to that in the Federal Courts under the new Federal Rules of Procedure, at least in so far as the declaration is concerned.

There is one possible exception to this in the case where relief may be had both at common law and under a statute. Here, if the doctrine of the *Abrams* case[21] stands, it is best to point out the statutory liability

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[19]185 Miss. 530, 187 So. 535 (1939). In this case the plaintiff traded in an old car to the defendant auto company and was given a car to use pending arrival of the new models. While plaintiff had the used car in his possession it was wrecked by his wife. The defendant applied the credit that it had given plaintiff for his old car to the expenses of fixing the used car that was wrecked by plaintiff's wife. Plaintiff brought this suit for conversion of his old car. Defendant claimed that the proper action was not one for conversion, but that the suit should have been founded on the contract theory. The Court held that they would allow recovery on the declaration because it set forth sufficiently the nature of the transaction to advise the defendant of its character. This seems to indicate that the Court is placing our system in the classification of "notice pleading" rather than "issue pleading."

[20]187 Miss. 858, 193 So. 915 (1940). This was the case against a common carrier for damage to goods shipped over it. The damage was caused by a shifting of the lugs in which the goods were packed. The defendant claimed that the burden of proving the negligence in the handling of the lugs was on the plaintiff, because the plaintiff alleged in his declaration that the damage was caused by "the negligence of the defendant railroad company and its connecting carriers in failing to transport said shipment with the proper degree of care and in handling said shipment in a rough and negligent manner." The Court said that this allegation was unnecessary and might be treated as surplusage; the declaration having alleged the delivery of the goods to the appellant in good condition and the delivery by it to the consignee in a damaged condition, a good cause of action was made out.

[21]See note 11 *supra.*

in a separate count. It seems that the doctrine of the *Abrams* case is not consistent with the modern view of the Court; but the case has not been specifically overruled[22] and it is hard to say whether it is still controlling. Advice cannot be given as to the best procedure to follow in this situation and it is hoped that the Court will straighten the situation out in the near future by indicating whether or not it will follow the rule laid down in the *Abrams* case.

J. Louis Alford

Violation of Highway Statutes as Negligence in Mississippi

I. *Is Violation Negligence?*

The authorities are in conflict as to the effect to be given statutory violations in tort actions based on negligence. Three views have been taken. Statutory violations have been considered as: (1) negligence *per se*;[1] (2) prima facie evidence of negligence;[2] (3) some evidence of negligence.[3] Though in the first case in which this problem was presented[4] the Mississippi Court did not definitely commit itself to any of these views, in the later cases it seems to have adopted the first of them.

Thus, in *Frazier v. Hull*,[5] plaintiff was standing at the rear of his automobile putting the tools back in his car after having fixed a flat tire, when he was struck by defendant's car. Defendant alleged that the plaintiff's car had no tail light as required by statute.[6] Plaintiff alleged that defendant did not have headlights as required by statute[7] and that she was driving at a greater rate of speed than was reasonable and proper under the circumstances.[8] The jury were instructed that it was the duty

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[22]But *cf.* Brown v. Mississippi Cent. R. R., 144 Miss. 769, 109 So. 851 (1927). The plaintiff brought action for the statutory penalty for cutting trees and also for the actual value of the trees cut. Judge Ethridge said that the two causes of action could be joined in one count. In fact, he stated that proper pleading requires that both demands be set out in one count. This case may be distinguished from the *Abrams* case, however, because this case was brought under a statutory provision which provided that "and for such actual damages and for such penalty the owner may recover in the same suit." Miss. Code Ann. (1930) § 3411.

[1]Murphy v. Adams, 99 Conn. 632, 122 Atl. 398 (1923); Silva v. Waldie, 42 N. M. 514, 82 P. (2d) 282 (1938); Kormos v. Cleveland Retail Credit Men's Co., 131 Ohio St. 471, 3 N. E. (2d) 427 (1936).

[2]McElhinney v. Knittle, 199 Iowa 278, 201 N. W. 586 (1925); Corbett v. Scott, 243 N. Y. 66, 152 N. E. 467 (1926).

[3]Gordon v. Bedard, 265 Mass. 408, 164 N. E. 374 (1929); Stevens v. Luther, 105 Neb. 184, 180 N. W. 87 (1920). For general discussions of the problem see 4 Blashfield, Automobiles (1934) §§ 2681-2706; Lowndes, *Civil Liability Created by Criminal Legislation* (1932) 16 Minn. L. Rev. 316; Malburn, *The Violation of Laws Limiting Speed as Negligence* (1911) 45 Am. L. Rev. 214; Morris, *Relation of Criminal Statutes to Tort Liability* (1933) 46 Harv. L. Rev. 453; Thayer, *Public Wrong and Private Action* (1914) 27 Harv. L. Rev. 317.

[4]Ulmer v. Pistole, 115 Miss. 485, 76 So. 522 (1917).

[5]157 Miss. 303, 127 So. 775 (1930).

[6]Miss. Code Ann. (Hemingway, 1917) § 5782.

[7]*Ibid.*

[8]Miss. Code Ann. (Hemingway, 1927) § 6680.

of the plaintiff to have a red light burning on the rear of his automobile, and that if they believed that he did not have such a light, and that his failure so to do was the sole proximate cause of his injury, they would find for the defendant. The jury found for the defendant. In reversing this case, the Court stated:

> "The failure to have the rear light of the automobile burning, if such failure there was, was more than a mere condition; it was a failure to discharge a duty enjoined by the statute for the prevention of the very thing that occurred, and, if it was the sole proximate cause of the accident, would bar the appellant's recovery, or, if it merely contributed thereto, would diminish the amount of his damages."[9]

This statement shows that the Court considers violation of the statute negligence. The Court also holds that defendant's violation of the statute constituted negligence; but, since defendant's violation consisted in part of violating the reasonable rate of speed statute and since this statute is but a statement of the common law measure of care, the Court's statement of the effect of the defendant's violation is not so plain. The case was reversed, because the Court considered that under the evidence the jury should not have been permitted to find that plaintiff's negligence was the sole proximate cause of the injury.

A case stating what seems to be the general rule is *White v. Weitz*.[10] This case came up on an instruction in regard to the prima-facie statute,[11] but in discussing this instruction, the Court stated that it considered a violation of the statute to be negligence. The trial court had instructed the jury that if plaintiff was going more than forty miles an hour, he was prima facie guilty of negligence.[12] This aspect of the case will be discussed later in detail, but it is pertinent here, because, in clarifying its position on this point, the Court made the following statement:

> "That does not mean, however, that the court cannot instruct the jury for the plaintiff that a violation of the statute by the defendant is negligence, and where such negligence is the proximate cause of the injury the plaintiff is entitled to recover, or, on the other hand, instruct the jury on behalf of the defendant that if the violation of the statute by the plaintiff was the sole proximate cause of the injury the plaintiff is not entitled to recover."[13]

From this quotation it seems that the intention of the Court is to deprive the jury of the opportunity of finding that the defendant is not negligent. Having been told what constitutes violation of the statute, the jury are then to be instructed that violation of the statute is negligence, and if this violation was the proximate cause of the plaintiff's injury, they are to return a verdict for the plaintiff. Thus, the problem of what

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[9]157 Miss. 303, 309, 127 So. 775, 776 (1930).
[10]169 Miss. 102, 152 So. 484 (1934).
[11]Miss. Code Ann. (1930) § 5588.
[12]Based on Miss. Code Ann. (1930) §§ 5569, 5588.
[13]169 Miss. 102, 109, 152 So. 484, 486 (1934).

amounts to negligence is to be decided by the court, with the jury determining whether there was a violation of the statute, whether this violation was the proximate cause of the injury, and assessing the damages.[14]

The Supreme Court seems to accord the same treatment to municipal ordinances that it does to highway statutes.[15]

There are some cases, however, which have not fitted in with this statement of the rule and which require separate consideration. In *Ripley v. Wilson,*[16] for example, defendant offered evidence to show that, on approaching the street intersection at which the accident occurred, he was unable to see plaintiff's automobile approaching on the other street until he had driven his car into the street. Seeing plaintiff's car approaching at a high rate of speed, he turned to the left side of the street in an attempt to permit plaintiff to pass without hitting his car. The effort was fruitless and the collision occurred. The trial court gave a peremptory instruction for plaintiff. The Court used the following language in reversing the case:

> "Generally speaking, a failure to observe the statute is negligence per se, but we do not think the statute was meant to prevent a person in a case of emergency when in danger of a collision from turning and going upon the wrong side of the street. In such case, the paramount duty of the driver is to avoid injury if it can be done, and if it reasonably appeared to the appellant, judging by appearances at the time, that turning would prevent, or would be likely to prevent, the injury, that his duty would be to turn, even though it threw him on the wrong side of the road. . . [T]he questions of negligence are generally for the jury, and the particular facts involved in this case, in our opinion should have gone to the jury."[17]

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[14]In McDonough Motor Express Inc. v. Spiers, 180 Miss. 88, 177 So. 655 (1937) the Court gives the rule for an instruction in such cases: "The jury should have been instructed as to what constituted excessive speed—more than twenty miles an hour in any municipality, section 5569, Code of 1930—and that motor trucks were required to keep on the right-hand side of the center line of the highway, except under the conditions named in section 9 of Chapter 332, Laws of 1932, and, if they believed from the preponderance of the evidence that appellant violated either of these statutes and that such violation proximately contributed to the collision and injury, they should find a verdict for the plaintiff." In accord as to violation of a statute constituting negligence; Harper v. Wilson, 163 Miss. 199, 140 So. 693 (1932) (defective lights); Wheat v. Wheat, 162 Miss. 595, 139 So. 849 (1932) (defective brakes); Williams v. State, 161 Miss. 406, 137 So. 106 (1931) (driving while intoxicated); Terry v. Smylie, 161 Miss 31, 133 So. 662 (1931) (exceeding speed limit); Rowlands v. Morphis, 158 Miss 662, 130 So. 906 (1930) (exceeding speed limit); Flynt v. Fondren, 122 Miss. 248, 84 So. 188 (1920) (exceeding speed limit and being on wrong side of road).

[15]Reid v. Halpin, 178 So. 88 (Miss. 1938) (failure to stop at intersection); Delta Cotton Oil Co. v. Elliott, 179 Miss. 200, 172 So. 737 (1937) (speed ordinance, ordinance requiring car to be on right of road, and ordinance requiring car to keep to right of center of intersection); Somerville v. Keeler, 165 Miss. 244, 145 So. 721 (1933) (letting child under age set by ordinance drive car); Terry v. Smylie, 161 Miss. 31, 133 So. 662 (1931) (parking ordinance). *See* Ulmer v. Pistole, 115 Miss. 485, 76 So. 522 (1917) (speed ordinance).

[16]140 Miss. 845, 105 So. 476 (1925).

[17]*Id.* at 852, 105 So. at 477.

The Court goes further and quotes from a treatise[18] to the effect that violation of a statute is prima facie evidence of negligence and defendant may rebut this presumption by showing the circumstances making it reasonably necessary for him to violate the statutory requirement.

The language in this opinion is thus quite inconsistent. From the latter part of the opinion the case might be considered as merely contra to the general rule that violation of a statute is negligence *per se,* and dismissed as being out of line with the rest of the authority in Mississippi. But the first part of the quotation suggests a way to reconcile the decisions with the general rule: an exception is created when a sudden emergency requires an individual to violate the traffic regulation in an attempt to avoid an accident. This interpretation is strengthened by the fact that later Mississippi cases apparently followed this decision.[19]

Although this emergency doctrine has not been frequently used, it has been followed in other states,[20] and its use seems to be increasing. Since the general rule in Mississippi is that violation of a statute is negligence *per se,* the application of the emergency doctrine must be raised by the defendant. If this emergency theory is adopted as an exception to the general rule, there is still a question for the judge as distinguished from the jury. He must decide when there is sufficient question of emergency to warrant the jury in finding that the defendant was justified in violating the statute. Thus he must decide whether to instruct that violation of the statute is negligence, or to instruct that violation of the statute is negligence unless the jury find that defendant was faced with an emergency which justified him in violating the statute. Unless he determines that the facts warrant the second instruction, the jury will have no authority to relax the standard of care set by the statute.

The question of pedestrians walking on the wrong side of the road has given the Court much trouble. In *Basque v. Anticich*[21] the trial court granted defendant an instruction submitting the question of contributory negligence to the jury, but this instruction is not set out in the opinion. The Court then uses this language:

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[18]3-4 HUDDY, AUTOMOBILES (9th ed. 1931) § 270. (In the opinion the fifth edition was cited.)

[19]Priestley v. Hayes, 147 Miss. 843, 112 So. 788 (1927). Here plaintiff went onto the wrong side of the road to cross street-car tracks more easily and defendant went on the wrong side to go around him. Plaintiff cut back to his right and a collision occurred. The Court correctly stated that it was for the jury to determine defendant's negligence. It made a doubtful factual application of the rule to the plaintiff—evidently considering the tracks as such an obstruction as to warrant him in turning to the left. The doctrine also seems to have been applied in Cox v. Dempsey, 177 Miss. 678, 171 So. 788 (1937); *cf.* Public Service Corp. v. Watts, 168 Miss. 235, 150 So. 192 (1933), and Flynt v. Fondren, 122 Miss 248, 84 So. 188 (1920).

[20]Hammer v. Connecticut Co., 94 Conn. 127, 108 Atl. 534 (1919); Oliff v. Howard, 33 Ga. App. 778, 127 S. E. 821 (1925); Pruett v. Brantley, 127 So. 2 (La. App. 1930); Sathrum v. Lee, 180 Minn. 163, 230 N. W. 580 (1930) (citing and quoting from Ripley v. Wilson); Notes (1932) 79 A. L. R. 1277, (1937) 111 A. L. R. 1019.

[21]177 Miss. 855, 172 So. 141 (1937).

> "It was clearly a question for the jury as to whether or not she was negligent under the circumstances, and no error was committed in giving the instruction."[22]

It is impossible to tell exactly what the Court means by the language in this case. Since plaintiff testified that she was on the wrong side of the road, that fact is clear. Does the Court mean that proximate cause is to be decided by the jury? Or does it mean that the jury is to determine by the common law standard of a reasonable man whether she was negligent or not?

In the rather queer decision of *Avery v. Collins*,[23] the question of the pedestrian-plaintiff's negligence in being on the wrong side of the road was not considered at all. This may be because the question of contributory negligence was not raised in the lower court.

On the other hand, in *Wheat v. Wheat*,[24] and in *Evans Motor Freight Lines v. Fleming*,[25] the Court upheld instructions that the pedestrian-plaintiff was negligent in walking on the wrong side of the road. This amounts to a ruling by the Court, as a matter of law, that walking on the wrong side of the road is negligence. From the above cases, it is not apparent what rule the Court applies to cases of pedestrians walking on the wrong side of the road, but the latest case[26] holds it to be negligence.

It will be noted that all of the Mississippi cases not following the general negligence *per se* doctrine have involved the "rule of the road", *i. e.*, have involved the question of which side of the road the party should be on. Is this factor significant? A recent New York case[27] is noteworthy in this connection. The lower court in this case refused to instruct that plaintiff was guilty of contributory negligence, as a matter of law, in walking on the wrong side of the road. In affirming this ruling, the court stated that there are two types of statutes: those laying down a rigid standard of care and those prescribing a general rule of conduct for ordinary situations. The legislative requirement that pedestrians walk facing the traffic was considered of the latter type.[28] "We cannot assume reasonably that the legislature intended that a statute enacted for the preservation of the life and limb of pedestrians must be observed when observance would subject them to more imminent danger."[29] This case

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[22]*Id.* at 861, 172 So. at 142.

[23]171 Miss. 636, 157 So. 695 (1934). In this case the Court took judicial notice of the fact that a pedestrian often jumps to the left when he becomes aware of the approach of a car behind him. It placed the duty on a driver to stop if necessary to let the pedestrian know that he was approaching.

[24]162 Miss. 595, 139 So. 106 (1932).

[25]184 Miss. 808, 185 So. 821 (1939).

[26]Evans Motor Freight Lines v. Fleming, 184 Miss. 808, 185 So. 821 (1939).

[27]Tedla v. Ellman, 280 N. Y. 124, 19 N. E. (2d) 987 (1939). This case is noted in (1940) 9 Brooklyn L. Rev. 343, (1939) 17 N. Y. U. L. Rev. 143, (1939) 34 Ill. L. Rev. 229, (1939) 18 Tex. L. Rev. 102.

[28]Illustrative of the attitude of the courts toward the rule of the road is Hartley v. Berg, 144 Ore. 44, 25 P. (2d) 932 (1933), in which the court said: "Rules of the road . . . do not contemplate strict compliance . . . except when a car meets and passes another coming from the opposite direction."

[29]Tedla v. Ellman, 280 N. Y. 124, 19 N. E. (2d) 987, 991 (1939).

seems to limit disregard of a general rule of conduct declared by statute to situations in which it would be more dangerous to follow the rule set out than to disregard it.[30]

This case also involves a problem similar to that facing the Mississippi Court in *Ripley v. Wilson*.[31] The Mississippi Court solved that problem by announcing the emergency doctrine. By taking this doctrine and extending it to apply to highway statutes other than the law of the road[32] and to cases in which circumstances made it necessary for the defendant deliberately to violate the statute without being suddenly faced by a danger,[33] the New York court would have reached the same result without trying to distinguish between various classes of statutes. This would be the simpler way to solve the problem. If these extensions are made, the term *emergency* would no longer describe the doctrine. Perhaps the course followed by the Iowa court is the best solution.[34] It holds that violation of a statute is negligence *per se* unless the defendant shows some "legal excuse." The legal excuses listed are: (1) Anything that would make it impossible to comply with the statute or ordinance; (2) Anything over which the driver has no control, which places his car in a position contrary to the provisions of the statute or ordinance; (3) Where the driver of the car is confronted by an emergency not of his own making, and by reason thereof he fails to obey the statute; (4) Where a statute specifically provides an excuse or exception.[35]

Strict application of the negligence *per se* doctrine would often result in declaring a person negligent when in reality he followed the wisest and safest course of conduct by violating the statute. Yet, in the vast

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[30]The Mississippi case of Avery v. Collins, 171 Miss. 636, 157 So. 695 (1934) gives no indication that the Court had any such limitation in mind. The only reason given by the Court for the pedestrian being on the wrong side of the road was that the statutory requirement to walk to the left "has not yet been translated into a common practice of the people." In none of the cases involving pedestrians walking on the wrong side of the road is there any indication that there was any danger forcing them to walk on that side.

[31]140 Miss. 845, 105 So. 476 (1925).

[32]Every case in Mississippi in which the emergency doctrine has been applied has involved a violation of the law of the road, but the theory on which the decision in Ripley v. Wilson is based, and the language used by the Court in announcing the doctrine, indicate that it could be applied to other highway statutes. The case of Kisling v. Thierman, 214 Iowa 911, 243 N. W. 522 (1932) indicates that the Iowa court will extend it to violation of any highway statute. The theory behind allowing a man to turn to the left to avoid an accident should, for example, equally allow a driver to exceed the speed limit for the same purpose.

[33]This extension seems to have been made to cover obstacles in the road. See Priestley v. Hayes, 147 Miss. 843, 112 So. 788 (1927).

[34]Kisling v. Thierman, 214 Iowa 911, 243 N. W. 552 (1932); Kadlec v. Johnson Const. Co., 217 Iowa 299, 252 N. W. 103 (1933).

[35]Kisling v. Thierman, 214 Iowa 911, 243 N. W. 552, 554 (1932). Other exceptions to the strict application have relieved the defendant of liability when: (1) he skidded across the center line of the road without fault on his part; Chase v. Tingdale Bros., 127 Minn. 401, 149 N. W. 654 (1914); (2) he allowed an unlicensed person to drive a car without knowing that he had no license; Bowdler v. St. Johnsbury Trucking Co., 88 N. H. 331, 189 Atl. 353 (1937); (3) he swerved to the left of the center of the road in bringing the car to a halt when the driver's vision was obscured by a cloud of dust; Johnson v. Prideaux, 176 Wis. 375, 187 N. W. 207 (1922).

majority of cases, the negligence *per se* doctrine seems to be the best rule. Following the view set out above would result in retaining the desired qualities of the negligence *per se* rule and, at the same time, avoiding the harsh results which would follow a literal application.

II. *Prima Facie Statute*

Thus, with the possible exceptions listed, the Mississippi rule seems certain; but the whole matter is complicated by the prima facie statute.[36] It provides:

> ". . . in any action brought to recover damages, . . . caused by running or operating such motor vehicle in violation of any of the provisions of this chapter, the plaintiff . . . shall be deemed to have made out a prima facie case by showing the fact of such injury, and that such person . . . operating . . . such motor vehicle, was at the time of the injury running or operating . . . the said motor vehicle . . . in a manner contrary to the provisions of this chapter."

On first thought, this would seem to commit the state to the second view indicated in the beginning of this note, *i.e.*, that a showing of violation of a traffic regulation is prima facie evidence of negligence; but it will be noticed that the statute provides for a prima facie *case*. Under the prima facie evidence doctrine, further evidence will rebut the presumption of negligence; but, in view of the Mississippi rule that violation of a statute is negligence *per se*, it is apparent that the prima facie statute was intended to go further than the prima facie evidence doctrine. A consideration of the cases is necessary to clarify the situation.

Prior to 1931, there were cases in which the Court made reference to the prima facie statute, but there were no cases in which the Court made any real effort to analyze the statute and its effects on negligence cases.[37] The first square decision on the prima facie statute seems to be *Natchez Coca-Cola Bottling Co. v. Watson*.[38] Plaintiff's intestate was run over and killed on the highway by defendant's truck, which was violating certain requirements of the statute in regard to passing pedestrians.[39] All the facts of the injury were in evidence. The court refused an instruction requested by plaintiff to the effect that, if the jury believed from the evidence that defendant was violating certain named requirements of the statute in reference to passing pedestrians on a highway, and that the injury was caused by the

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[36]Miss. Code Ann. (1930) § 5588.

[37]Rowlands v. Morphis, 158 Miss. 662, 130 So. 906 (1930) (instruction as to prima facie presumption raised by statute held bad on another point, the Court giving no indication that it considered the instruction as to the presumption bad); Lucedale Automobile Co. v. Daughdrill, 154 Miss. 707, 123 So. 871 (1929) (stated that proof of violation made out prima facie case of negligence); Priestley v. Hays, 147 Miss. 843, 112 So. 788 (1927) (stated that violation created a prima facie presumption of negligence).

[38]160 Miss. 173, 133 So. 677 (1931).

[39]Miss. Code Ann. (Hemingway, 1927) §§ 6681, 6690.

operation of said truck, then plaintiff was deemed to have made out a prima facie case. In upholding the refusal of this instruction, the Court said:

> "All the facts and circumstances of the injury to the decedent were disclosed by the evidence offered by the respective parties, and, this being true, the liability vel non of appellant must be determined from such facts and circumstances and, consequently the instruction on the statutory presumption was properly refused."[40]

In the leading case of *White v. Weitz*,[41] the Court gives a lengthy discussion on the effect of the prima facie statute. Plaintiff and defendant's automobiles collided on the highway. Both parties presented evidence to show that the injury was the result of the negligence of the other party. On the issue of contributory negligence, the court instructed: "The court instructs the jury for the defendants that if you believe from the evidence that G. B. White was driving his car at the time of the accident at a rate of speed in excess of forty miles per hour, then the said G. B. White is prima facie guilty of negligence." In holding this instruction erroneous, the Court said:

> "If the instruction had gone further and told the jury that if the preponderance of the evidence showed that the violation of the statute was the sole proximate cause of the injury, they should find for appellees, it would not have come under the condemnation of the Walden and Coca-Cola cases. It is the prima facie presumption of the statute that cannot be used on the issue of liability where the facts and circumstances are in evidence. That does not mean, however, that the court cannot instruct the jury that a violation of the statute by the defendant is negligence, and where such negligence is the proximate cause of the injury, the plaintiff is entitled to recover, or, on the other hand, instruct the jury on behalf of defendant that if the violation of the statute by plaintiff was the sole proximate cause of the injury, plaintiff is not entitled to recover. It is the statutory presumption standing alone that neither is entitled to use as a witness where all the facts and circumstances are in evidence."[42]

These cases taken together seem to constitute the authority as to what instructions may be given the jury. They both state that, where the facts and circumstances are in evidence, the jury is to be given no instruction as to the prima facie statute. The Court has always been careful to say that this is so "where the facts and circumstances are in evidence." Exactly what significance is to be given to this statement is not immediately apparent.

It is quite clear under the *White* case that the court can instruct the

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[40]160 Miss. 173, 184, 133 So. 677, 680 (1931). See New Orleans & G. N. R. R. v. Walden, 160 Miss. 102, 133 So. 241 (1931) for a similar holding on the railroad prima facie statute [Miss. Code Ann. (1930) § 1580]. For a thorough discussion of the effect of the railroad statute, see Note (1939) 11 Mississippi Law Journal 416.

[41]169 Miss. 102, 152 So. 484 (1934).

[42]*Id.* at 109, 152 So. at 485.

jury that violation of a highway statute is negligence.[43] In regard to instructions that violation of the statute makes out a prima facie case, the fear in the mind of the Court seems to be that such an instruction would mislead the laymen making up the jury, and cause them to think that they are being instructed that the defendant is liable. This quotation also takes into consideration the element of proximate cause, which can best be discussed by considering *Rhodes v. Fullilove*.[44] In that case, the Court stated that plaintiff made out a prima facie case by showing violation of the statute, but that the prima facie case was rebutted by a showing that defendant's violation of the statute was not the proximate cause of the injury.[45] The Court stated that, in order to justify a directed verdict for the plaintiff, the evidence must be such that no other reasonable inference can be drawn therefrom except liability on the part of the defendant.

Under the interpretation put on the prima-facie statute in the *White* case it would probably have its only real effect in the case where the defendant offered no evidence. In such a case it would seem to entitle the plaintiff to a directed verdict.[46] But if the defendant offered sufficient evidence to rebut the plaintiff's case, the statutory presumption would disappear and the plaintiff would have to depend on the evidence to sustain his case. The statute would therefore not be of much use in this case. Under the negligence *per se* doctrine the plaintiff can get an instruction that violation of the highway statute is negligence. This would then leave only the question of proximate cause to give him a complete case.[47]

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[43]*Accord:* Reid v. Halpin, 178 So. 88 (Miss. 1938); Terry v. Smylie, 161 Miss. 31, 133 So. 662 (1931).

[44]161 Miss. 41, 134 So. 840 (1931).

[45]*Accord*: Walker v. Dickerson, 183 Miss. 642, 184 So. 438 (1938); Marx v. Berry, 176 Miss. 1, 168 So. 61 (1936); Oliver Bus Lines v. Skaggs, 174 Miss. 201, 164 So. 9 (1935).

[46]New Orleans & G. N. R. R. v. Walden, 160 Miss. 102, 133 So. 241 (1931); Alabama & V. R. R. v. Thornhill, 106 Miss. 387, 63 So. 674 (1913). These cases together state this to be the rule in applying the railroad prima facie statute [Miss. Code Ann. (1930) § 1580]. In White v. Weitz, 169 Miss. 102, 152 So. 484 (1934), the interpretation of the railroad prima facie statute is, to some extent at least, applied to the highway prima facie statute. For a discussion of the railroad prima facie statute see Note (1939) 11 Mississippi Law Journal 416.

[47]The interesting question of proximate cause in connection with these cases is too large and has too many ramifications to be discussed in the space available. Cases of interest in this connection include Marx v. Berry, 176 Miss. 1, 168 So. 61 (1936); White v. Weitz, 169 Miss. 102, 152 So. 484 (1934); Somerville v. Keeler, 165 Miss. 244, 145 So. 721 (1933); Rhodes v. Fullilove, 161 Miss. 41, 134 So. 840 (1931); Rowlands v. Morphis, 158 Miss. 662, 130 So. 906 (1930); Frazier v. Hull, 157 Miss. 303, 127 So. 775 (1930). A thorough discussion of proximate cause and intervening cause is found in Oliver Bus Lines v. Skaggs, 174 Miss. 201, 164 So. 9 (1935). Although it is impossible to make a complete analysis of these cases here, attention may be called to one striking factor which an examination of these cases has revealed. The Court has adopted various tests for determining whether the negligence in question was the proximate cause of the injury; but in every case in which the jury found that the violation was the proximate cause, the verdict was affirmed; the only reversals were in cases where the jury found that the violation was not the proximate cause.

It is evident that in traffic accident cases the appellate Court is not using the proximate cause device to limit liability. Perhaps the prima facie statute has helped to develop this attitude.

A problem yet to be decided is whether the prima facie statute will apply to the Uniform Highway Traffic Regulation Act, adopted in Chapter 200 of the Laws of 1938.[48] An indication that it will apply is the fact that most of the other sections of Chapter 138 of the Code of 1930 were expressly repealed and the prima facie statute was not referred to. It is true that the prima facie statute states that it is to apply to violations of "this chapter," but it may have been the intention of the Legislature to substitute the Laws of 1938 for Chapter 138.

Attention might here be called to the special provisions of the speed regulations in the highway laws of 1938.[49] This statute states that a vehicle shall not be driven at a greater speed "than is reasonable and prudent under the conditions then existing." It adds that certain speeds will be lawful, "but any speed in excess of said limit shall be prima facie evidence that the speed is not reasonable or prudent. . . . " It seems that under this statute a violation of the speed limits is prima facie evidence of negligence. It cannot mean a prima facie *case,* because subsection (f) of the same section provides: "The foregoing provisions of this section shall not be construed to relieve the plaintiff in any civil action from the burden of proving negligence upon the part of the defendant as the proximate cause of an accident." These provisions as to evidence appear in no other section of the act of 1938. It is possible that, since these provisions appear in no other section of the act of 1938, the Court may decide that there is no presumption in regard to the other sections of the act, and therefore refuse to apply the prima facie statute.

Richard G. Lord
E. G. Truly, Jr.

Impeachment of Verdicts by Jurors in Mississippi

It is an established rule in almost all jurisdictions of the United States that a juror's testimony will not be admitted to impeach his verdict.[1] This rule was first laid down in 1785 in the case of *Vaise v. Delaval,*[2] decided by Lord Mansfield, who based his decision on the then popular maxim, "a witness shall not be heard to allege his own turpitude."

This maxim has long since been discarded in the law of evidence in every respect save the instant rule.[3] The continued and widespread use

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[48]Miss. Code Ann. (Supp. 1938) c. 122B.

[49]Miss. Laws 1938, c. 200, § 51; Miss. Code Ann. (Supp. 1938) § 1434.

[1]64 C. J. p. 1108, § 914; 27 R. C. L. p. 896, § 68; 5 Jones, Commentaries on Evidence (2d ed. 1926) § 2211; 8 Wigmore, Evidence (3rd ed. 1940) § 2349.5. For a discussion of the general principles involved in these cases, see (1931) 9 N. Y. U. L. Q. Rev. 105.

There are a few jurisdictions, however, which fail to apply the rule in all cases, and allow such testimony by jurors. Among these are Florida, Iowa, Kansas, Nebraska, North Dakota, Ohio, Oregon, Tennessee, and Texas. For discussions of the Iowa and Texas views respectively, see Notes (1926) 11 Iowa L. Rev. 268, (1939) 17 Tex. L. Rev. 227, (1935) 13 Tex. L. Rev. 538.

[2]1 T. R. 11 (K. B. 1785).

[3]8 Wigmore, Evidence (3rd ed. 1940) § 2352.

of the rule is due, not to its original foundation of selfstultification, but rather to principles of policy which were evolved after it had become definitely established.

Chief among these is the desirability of according finality to the verdict. Were members of a jury permitted to testify to events taking place in the jury room, many verdicts would be repudiated unnecessarily and no determination of jury trials could be expected. A natural doubt as to the justice of his verdict, coupled with some feeling for the losing party, will in many cases lead a juror to change his mind after his discharge and testify that he was influenced by improper evidence or coercion of a fellow juror. The natural result will be testimony by other jurors upholding the verdict, thus presenting a new problem to the courts, and it will be difficult to determine when a suit is terminated. There must be public confidence in the court system, and much of that confidence would be destroyed if the verdict were only *pendente lite,* dependent upon subsequent approval or repudiation by the jurors. This is demonstrated by the case of *Moore v. Ivey,*[4] decided in the state of Texas, where affidavits of misconduct are allowed by statute, and testimony of jurors was taken inquiring into all the discussions of the jury room.

Many courts have cited as reasons for applying the rule the possibility of fraud and tampering after the verdict is rendered. Wigmore suggests that two rules of procedural law are the substance of the instant rule and that the courts should apply them to effect their result rather than merely repeat the shibboleth that "a jury cannot impeach its verdict."[5] His first rule is that of privileged communications, which would prohibit testimony of utterances in the jury room.[6] This encourages a freedom of expression which is conductive to a more just verdict. The second principle is the parol evidence rule. The verdict is required to be in writing and the general rule applies that its effect must be got from the writing itself. The written verdict is fixed and certain and settles the rights of the parties. To allow later questioning of jurors with respect to their intentions would be to have its effect depend on

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[4]277 S. W. 106 (Tex. Comm. App. 1925). In this suit by a patient to recover for negligence of a doctor in an operation, jurors were allowed to testify that one juror had told the facts and result of a similar case, that another had considered the probability that the doctor was protected by insurance, that they had discussed the probability that the attorneys would get a large part of the judgment, and that they thought a judgment for plaintiff here would make doctors more careful. The advisability of this testimony was not questioned; and the only consideration was to the probable effect of it on the verdict.

[5]8 WIGMORE, EVIDENCE (3rd ed. 1940) §§ 2346, 2348.

[6]The application of the privileged-communications rule is discussed in Note (1933) 31 MICH. L. REV. 857.

their memory, clearness of intellect, and perhaps views taken up afterwards.[7]

The rule itself, however, has become so well established that most courts are content merely to repeat it as a general principle of law, and not separate it into its component parts.

The Mississippi Supreme Court recognized it early and applied it in 1839 in the case of *Friar v. State*.[8] In that case a juror contended that he had assented to a verdict of guilty only upon the drawing up of a letter to the court recommending a new trial, and because he thought it "would have a great influence on the mind of the court." The Supreme Court held "the court had no authority to notice the affidavit of the juror which tended to impeach his conduct and repudiate his verdict. It is not competent for one of the jury to prove the misbehavior of his brethren. Nor can the affidavit of jurors be received to impeach their verdict." This is similar to cases in other jurisdictions which rejected jurors' testimony that they had assented under the erroneous belief that the judge would use clemency or would have the legal right to vary the sentence.[9] It is generally held also that such testimony is not admissible to show that the jurymen failed to understand the effect of their verdict.[10]

In *Yazoo & M. V. R. R. v. Gore*[11] the jury failed to return a verdict at all because the twelve were unable to agree and they misunderstood the court's instructions that the assent of nine jurors would suffice. The Court refused to receive affidavits of nine jurors that they had agreed soon after retiring, because it "would be a violation of the well-established rule prohibiting a jury from giving testimony vitiating its own verdict." It is the general rule that a misunderstanding of the court's instructions may not be shown by a juror's testimony in impeachment of the verdict.[12]

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[7]The foundation for its application in Mississippi is laid down in Brister v. State, 86 Miss. 461, 463, 38 So. 678, 679 (1905), where the Court adopts the language of 14 ENC. PR. & PR. 906-909, as follows: "Such evidence is forbidden by public policy, since it would disclose the secrets of the jury room, and afford opportunity for fraud and perjury. It would open such a door for tampering with weak and indiscreet men that it would render all verdicts insecure; and, therefore, the law has wisely guarded against all such testimony, and has considered it as unworthy of notice. It would be a most pernicious practice, and in its consequences dangerous to this much-valued mode of trial, to permit a verdict, openly and solemnly declared in court, to be subverted by going behind it and inquiring into the secrets of the jury room."

[8]3 How. 422 (Miss. 1839).

[9]State v. Keehn, 85 Kan. 765, 118 Pac. 851 (1911); State v. Burk, 132 Mo. 363, 34 S. W. 48 (1896); State v. Bennett, 40 S. C. 308, 18 S. E. 886 (1894).

[10]Reiff v. Interstate Business Men's Acc. Ass'n of Des Moines, Iowa, 127 Ark. 254, 192 S. W. 216 (1917); Bishop v. State, 9 Ga. 121 (1850); State v. Wallman, 31 La. Ann. 146 (1879); State v. Best, 111 N. C. 638, 15 S. E. 930 (1892); State v. Cobbs, 40 W. Va. 718, 22 S. E. 310 (1895).

[11]151 Miss. 145, 117 So. 521 (1928).

[12]Caldwell v. Spears & Sons, 186 Ky. 64, 216 S. W. 83 (1919); State v. Millican, 15 La. Ann. 557 (1860); Bridgewater v. Plymouth, 97 Mass. 382 (1867); State v. Beesskove, 34 Mont. 41, 85 Pac. 376 (1906); Winslow v. Smith, 74 N. H. 65, 65 Atl. 108 (1906); Jones v. Parker, 97 N. C. 33, 2 S. E. 370 (1887); State v. Forrested, 14 N. D. 335, 103 N. W. 625 (1905); Holman v. Riddle, 8 Ohio St. 384 (1858); Handy v. Ins. Co., 1 R. I. 400 (1850); State v. Aughtry, 49 S. C. 285, 26 S. E. 619, 27 S. E. 199 (1897); People v. Flynn, 7 Utah 378, 26 Pac. 1114 (1891); Marcy v. Parker, 78 Vt. 73, 62 Atl. 19 (1905).

The cases discussed up to this point have involved testimony by jurors as to their reasons, motives, and beliefs in reaching the verdict. The rule is extended in *Riggs v. State*[13] to include actual misconduct on the part of the jurors themselves.

But, although the misconduct of jurors may not be shown by their own testimony, it is generally held that it may be shown by testimony of third persons who witnessed it.[14] Lord Mansfield recognized this in *Vaise v. Delaval.*[15] This is no exception to the rule as it is commonly expressed, because the testifying witness is not alleging his own turpitude.

The converse of this doctrine has also been sustained and jurors allowed to testify to the misconduct of third parties which might reasonably have influenced their verdict.[16]

Juror's affidavits were allowed for the purpose of showing improper statements by the officers in charge of the jury in *Nelms v. State*[17] and in *Barnett v. Eaton.*[18] The jurors may testify, however, only as to the fact of misconduct, and not as to its prejudicial effect on them. The court must determine from the nature of the improper statement whether it would naturally be conducive to a prejudicial effect.[19]

This exception might have been expanded to allow one juror to testify to the misconduct of another, but the courts have failed to extend the exception this far.[20] They have usually refused to allow testimony of this sort even by a juror disagreeing with the verdict in cases not

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[13]26 Miss. 51 (1853). It was sought here to introduce the testimony of jurors that there had been a wrongful separation of the jury. The Court disregarded this testimony but awarded a new trial because the testimony of other witnesses was sufficient to establish the misconduct.

[14]Wilson v. Berryman, 5 Cal. 44, (1855); Houk v. Allen, 126 Ind. 569, 25 N. E. 897 (1890); Wright v. Abbott, 160 Mass. 395, 36 N. E. 62 (1894); Bradt v. Rommel, 26 Minn. 505, 5 N. W. 680 (1880); Boynton v. Trumbull, 45 N. H. 408 (1864).

[15]1 T. R. 11 (K. B. 1785). See note 2 *supra.*

[16]Alabama Fuel & Iron Co. v. Rice, 187 Ala. 458, 65 So. 402 (1914); Heller v. People, 22 Colo. 11, 43 Pac. 124 (1895); Spurck v. Crook, 19 Ill. 415 (1858); Knowlton v. McMahon, 13 Minn. 386 (1868); Wilkins v. Abbey, 168 Misc. 416, 5 N. Y. S. (2d) 826 (Sup. Ct. 1938).

[17]13 Sm. & M. 500 (Miss. 1850). Here two of the officers who had the jury in charge spoke of the enormity of the offense, by saying that it was "a worse case than Dyson's," and that public opinion was against the accused. The testimony of jurors was allowed to show these facts.

[18]62 Miss. 768 (1885). The bailiff in charge of the jury took part in the deliberations of the jury as if he were one of them, and talked garrulously about his own numerous experiences. The Court allowed an affidavit of one of the jurors to show that the bailiff was the partisan of one of the parties.

[19]Shaw v. State, 79 Miss. 577, 31 So. 209 (1901). The sheriff said in the jury's hearing that they would be locked up until Monday unless they returned a verdict soon, and they returned one in five minutes. The testimony of jurors was held competent to show that the sheriff had said this, and the Court presumed that it resulted in prejudice and award a new trial.

[20]Amsby v. Dickhouse, 4 Cal. 103 (1854); Knight v. Fisher, 15 Colo. 176, 25 Pac. 78 (1890); Bryan v. Moncrief Furnace Co., 38 Ga. App. 107, 142 S. E. 700 (1928); State v. Beste, 91 Iowa 565, 60 N. W. 112 (1894).

requiring a unanimous assent to reach a verdict.[21] While the facts are not clearly stated in *Ulmer v. Pistole*,[22] the language of the opinion is apparently in accord with this statement.

A decision such as that of *Taylor v. State*[23] which holds that a third person is not allowed to testify concerning statements to him by one of the jurors about misconduct in the jury room is obviously in accord with the general rule.[24] Here, too, there is the further objection to the testimony that it is only hearsay evidence and thus inadmissible.

The most recent important case decided by the Mississippi Court involving improper influence is *Sprinkle v. State*.[25] In that case several jurors bought newspapers containing an account of the trial which gave information about defendant's past exploits. These facts would have been incompetent as evidence on the trial. In the opinion the Court drew an analogy between the jury's getting this information through the misconduct of third persons, to which they clearly could testify, and getting it from a newspaper bought by the jurors. It allowed the testimony of jurors to show that they had read the article, but not its influence on their verdict.

This case is apparently inconsistent with statements in the earlier case of *Brister v. State*[26] where the Court said that testimony of jurors as to reading law books pertaining to the case would be in impeachment of the verdict and would not be heard.[27]

Chief Justice Smith dissented in the *Sprinkle* case on the ground that jurors should not be allowed to testify to misconduct on the part

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[21]Egan v. Tulsa First Nat. Bank, 67 Okla. 168, 169 Pac. 621 (1917); Spain v. Oregon-Washington R. & N. Co., 78 Ore. 355, 153 Pac. 470 (1915).

[22]115 Miss. 485, 76 So. 522 (1917). The Court uses the following language: "As to these last contentions we hold that a verdict in civil cases returned by nine jurors is valid and constitutional, and the verdict cannot be impeached by any of the twelve jurors on the jury."

[23]52 Miss. 84 (1876). One of the jurors is alleged to have stated in the jury room matters of personal knowledge pertaining to defendant. This was made to appear by the affidavit of a party to whom this juror told it after the conviction. This was held inadmissible.

[24]Palmer v. People, 138 Ill. 356, 28 N. E. 130 (1891); State v. Cloud, 130 La. 955, 58 So. 827 (1912); St. Martin v. Desnoyer, 1 Minn. 156, 61 Am. Dec. 494 (1854); Blodgett v. Park, 76 N. H. 435, 84 Atl. 42, Ann. Cas. 1913B 853 (1912).

[25]137 Miss. 731, 102 So. 844 (1924).

[26]86 Miss. 461, 38 So. 678 (1905). Testimony of jurors to the effect that one of them had opened a volume of the Mississippi Code found in the jury room and read applicable statutes and explained their meaning to the other jurors, held inadmissible.

[27]It may be possible, however, to distinguish between the two cases on the type of reading matter which the jury used in each case. A knowledge of the law of the case should not be prejudicial to defendant, and thus the fact of reading law books would not of itself be sufficient ground for a new trial, unless it appears that a prejudice has actually resulted. But where a newspaper article containing a specific reference to defendant is involved, there would be stronger ground for reversal from showing the mere fact of reading it. Still, the distinction would be one based on the relative prejudicial effect which may be presumed to have resulted from the two items and is not based on the fact of reading them.

of other jurors. The majority opinion, however, does not consider this from the standpoint of misconduct on the part of jurors, but looks at it purely as "outside influence."

The full extent of the import of this case is not immediately perceptible, because the language of the opinion is not at all clear, and there have been no later cases interpreting its holding. However, there is little doubt that it at least makes inroads on the established doctrine.

It may be that the Court intends to allow testimony of jurors where there is objective evidence already indicating such misconduct. In cases like *Buckeye Cotton Oil Co. v. Owen*,[28] where slips of paper have been found in the jury room indicating that the jurors reached a "quotient verdict," that evidence has been held admissible. Possibly, then, the jurors would now be allowed to testify that the slips of paper had been prepared by them, as they testified in the instant case that they bought and read the newspaper.[29]

On the other hand, the case may be adopting a principle advocated by Wigmore,[30] in allowing juror's testimony as to improper conduct in the jury room, as distinguished from the reasons, motives, and beliefs of the jurors in reaching their verdict.

Still again, the Court may limit the exception in accordance with the language of the opinion and permit the jurors to testify only to any "outside influence" which is exerted on them during the trial. It is hard to tell, however, what meaning will be given to the phrase "outside influence."

It may be noted, too, that this case may be completely distinguished anyway. While the language indicates that there is to be an exception to the general rule, it is quite possible that there would have been enough evidence from other sources, though no other evidence is mentioned in the opinion, to justify the Court in setting aside the verdict and granting a new trial. It would be possible, therefore, for the Court to say that this other evidence was sufficient to sustain the holding, and that the incorrect language is not necessary to the decision and therefore not controlling in future cases.

Whatever interpretation is adopted, it is apparent that the Court now has a device which it may use to avoid the general rule in a particular case where the exigencies of justice are peculiarly pressing. The struggle has always been one between a desire to render justice in the individual case, and the belief that it is best to abide by a rule which has a general

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[28]122 Miss. 14, 84 So. 133 (1920).

[29]A more recent case on "quotient verdicts" is McKee v. Assad, 169 Miss. 496, 157 So. 799 (1934). Jurors were not allowed to testify to the fact of taking a quotient verdict, but this would not be inconsistent with the supposed principle in that there was no objective evidence already indicating such misconduct. For a discussion of the general rules on admitting juror's testimony to show that a quotient verdict was taken, see Note (1935) 23 CALIF. L. REV. 218.

[30]8 WIGMORE, EVIDENCE (3rd ed. 1940) §§ 2346-2354.

policy of establishing finality of verdicts. The Court may now render a judgment one way or the other depending on which of these policies seems most important in the case at hand.

It has always been recognized that the general rule does not apply in the cases where the verdict is ambiguous, or through mistake or otherwise, is recorded differently from the way it was rendered.[31] In such cases the testimony of jurors is admissible to show their true intention.[32] This is not an impeachment of the verdict, but instead a correction of it to make it express the true intention of the jurors and be responsive to the issues of the case. The parol evidence rule would not prohibit this correction just as it does not interfere in suits for reformation of contracts to comply with the true intentions of the parties. This was allowed in *Prussel v. Knowles*[33] where the verdict as read found all defendants guilty. The one juror remaining in the courtroom stated that this was not their intention, and upon similar testimony of all the other jurors, the court corrected the verdict so as to make it comply with their stated intention of omitting two of the defendants from the verdict of guilty.

In the case of *Morris v. Robinson Bros. Motor Co.*,[34] the problem was somewhat different. A verdict was returned which was not responsive to the issues in the case and "appeared to be for both plaintiff and defendant." The court directed the jury to retire again and give a verdict for one of the parties, and they found for plaintiff. Later defendant offered the testimony of jurors that they intended their first verdict to be for him. The Court held that it was proper for the judge to have the jury retire and find a proper verdict, and that once such a verdict was returned it was the only verdict in the case, and could not be impeached by the testimony of the jurors. This was not a case of reformation after the verdict was rendered, as there never was a verdict in the first return of the jury.

It has become a well settled rule that a juror may give testimony to sustain his verdict when it is attacked by others.[35] Thus in *Nunnery v. State*[36] where the defendant showed that there had been opportunity for improper communications with the jury, the Court held that the State

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[31]A discussion of the reformation of verdicts by testimony of jurors is contained in Note (1923) 32 YALE L. J. 503.

[32]Carlson v. Adix, 144 Iowa 653, 123 N. W. 321, Ann. Cas. 1912A 1204 (1909); Little v. Larrabee, 2 Greene 37, 11 Am. Dec. 43 (Me. 1822); Brickell v. Fleming, 281 S. W. 951 (Mo. 1926); Wirt v. Reid, 138 App. Div. 760, 123 N. Y. Supp. 706 (1st Dep't. 1910); Hubbard v. Brady-Hamilton Stevedores, 128 Ore. 165, 273 Pac. 702 (1929); Wolfgram v. Schoepke, 123 Wis. 19, 100 N. W. 1054, 3 Ann. Cas. 398 (1904).

[33]4 How. 90 (Miss. 1839).

[34]144 Miss. 861, 110 So. 683 (1926).

[35]Birmingham R. & E. Co. v. Mason, 144 Ala. 387, 39 So. 590 (1905); State v. West, 11 Idaho 157, 81 Pac. 107, (1905); Howard v. Com., 24 Ky. L. Rep. 612, 69 S. W. 721 (1902); Kennedy v. Kennedy, 18 N. J. L. 450 (1842); State v. Robinson, 20 W. Va. 713 (1882); 64 C. J. 1110, § 914, 27 R. C. L. 899, § 73; 8 WIGMORE, EVIDENCE (3rd ed. 1940) § 2354.

[36]87 Miss. 542, 40 So. 431 (1905).

could rebut the prima facie case made by this showing by the affidavits of jurors to show that actually there was no misconduct. The point was involved also in *Lewis v. State*,[37] and the Court commented upon it but remarked that it was unnecessary to decide it since the case must be reversed on other grounds.

A somewhat similar point was involved in the early case of *Organ v. State*.[38] The affidavit of a juror was introduced to support the verdict by denying any misconduct during his wrongful separation from his fellows. The Court held that the affidavit was inadmissible. This probably has been superseded by the *Nunnery* case discussed above. Ordinarily, such testimony is allowed in these cases,[39] and this would lend weight to the view that it is no longer in effect in Mississippi, especially in the language of the *Nunnery* case that the "modern and better doctrine is that he may testify in support of his verdict." The objection of the *Organ* case was based largely upon the theory that the affidavit would not be entitled to much weight because a juror who would be guilty of misconduct during separation would probably attempt to hide it. This would still be true today, but it would affect the weight of the affidavit as evidence and not its admissibility.

Marvin Williams

Truth as a Defense to Suit Under the Actionable Word Statute—the Decision of Jefferson v. Bates*

Plaintiff, a preacher, and defendant, a deacon in his church, had a difficulty over the location of the new church building. During the difficulty the deacon slapped the preacher, for which he was arrested. While under arrest, in an apparent effort to secure a compromise for the assault and battery, the deacon threatened to ruin the preacher if he did not stop prosecuting him, by reporting that the preacher had told him that he was going to burn down his own house. For this statement the preacher brought an action under the Mississippi Actionable Word Statute, which provides that all words which are "insults and calculated to lead to a breach of the peace, shall be actionable."[1]

[37]9 Sm. & M. 115 (Miss. 1847). Here one of the jurors was engaged in conversing, and in writing and receiving notes from a third person, not of the jury, during the arguments of prisoner's counsel. The trial court allowed his affidavit to be read to show that the correspondence and conversation was about a wholly different matter. The Court said, "This conduct was highly reprehensible, and should have subjected the juror to punishment. Whether it would avail of itself, to set aside the verdict need not be determined."

[38]26 Miss. 78 (1853).

[39]See authorities cited *supra* note 35.

*152 Miss. 569, 120 So. 444 (1929)

[1]On June 13, 1822, as Section 9 of an "Act To Suppress Duelling", Miss Rev. Code (1824) c. 50, the Mississippi Legislature passed what is now known as the Actionable Word Statute. At the present time the statute reads as follows: "All words which, from their usual construction and common acceptation, are considered as insults, and calculated to lead to a breach of the peace, shall be actionable; and a plea, exception or demurrer shall not be sustained to preclude a jury from passing thereon, who are the sole judges of the damages sustained; but this shall not deprive the courts of the power to grant new trials as in other cases." Miss. Code Ann. (1930) § 11.

The deacon pleaded the general issue and gave notice thereunder to the effect that his statement had been justified because the preacher had actually told him this. The court granted a peremptory instruction for the plaintiff on the grounds that the words uttered were actionable *per se,* and that the truth of the statement did not constitute a defense.

The main question with which the Court was concerned was whether the truth of the words constituted a bar to this action. In deciding this question the Court followed the previous Mississippi cases as well as the original cases in the Virginia courts, which state has a similar statute,[2] and held that the truth of the statement could not be pleaded as a defense or justification to the action, but could, at most, only justify a mitigation of the damages.[3]

The settlement of this question involves the problem of what interpretation the Court should place upon the statute in regard to its purpose. The statute is susceptible to three constructions: (1) an interpretation of the statute in the light of its original purpose—that is to prevent duelling or physical violence; (2) an interpretation amounting essentially to a subdivision of the law of libel and slander, which is simply to enlarge the field of words actionable *per se;* and (3) an interpretation of the statute as protecting a heretofore unrecognized legal right—the right to mental security against insulting language.

It seems clear that the original purpose behind the passage of the statute in both Mississippi and Virginia was to induce citizens of whom insulting words calculated to lead to a breach of the peace were spoken, to resort to the courts for redress by money judgment instead of the old-time method of "pistols and coffee for two."[4] As a practical matter it would seem that the purpose of the statute in the matter of preventing duels is no longer entitled to consideration. It was passed at a time when duelling was the custom, but this practice came to an end with the death of the civilization which had engendered it.[5]

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[2]In 1818 the Virginia Legislature had passed an act entitled, "An Act To Prevent Duelling" which was practically identical to the statute which the Mississippi Legislature passed a few years later. VA. REV. CODE (1819) p. 584, § 8. The only other state which has a similar statute is West Virginia. W. VA. CODE ANN. (Michie, 1932) § 5471.

[3]"The gravamen of the action is the saying any words, whether true or false, in an insulting manner. The truth or falsity of the charge contained in those words is an important consideration for a jury in estimating the actual amount of damages done to a plaintiff. It would make an extenuation, or constitute an aggravation, as the case might be." Crawford v. Melton, 12 Sm. & M. 328, 331 (Miss. 1849). See also Winton v. Patterson, 152 Miss. 158, 119 So. 161 (1928); McLean v. Warring, 13 So. 236 (Miss. 1893); Scott v. Peebles, 2 Sm. & M. 546 (Miss. 1844); Moseley v. Moss, 47 Va. 534 (1850); Brooks v. Calloway, 29 Va. 480 (1841).

[4]Landrum v. Ellington, 152 Miss. 569, 120 So. 444 (1929); Winton v. Patterson, 152 Miss. 158, 119 So. 161 (1928); Jefferson v. Bates, 152 Miss. 128, 118 So. 717 (1928); Grant v. Owens, 149 Va. 906, 141 S. E. 860 (1928); Chaffin v. Lynch, 83 Va. 106, 1 S. E. 803 (1887).

[5]"It does not seem to us that the original object of the statute in the matter of preventing duelling, is any longer entitled to consideration in considering the statute. If that was the only object, it should have been repealed 50 years ago as being obsolete and out of date." Grant v. Owens, 149 Va. 906, 915, 141 S. E. 860, 863 (1928). For an interesting comment in this regard, see Malone. *Insult in Retaliation—The Huckabee Case* (1938) 11 MISSISSIPPI LAW JOURNAL 333, 334.

If the statute is not now considered as having the purpose of preventing duelling, but as having that of seeking to prevent physical combat of any kind, as there is some indication the Mississippi Courts may still be doing,[6] it seems that the statute will still be of little practical value. It is hardly expected that individuals will passively submit to insults and await their action for damages. The Mississippi Legislature apparently recognizes this fact, and by another statute has in substance provided that insulting language may be considered by the jury as a defense or justification in a criminal trial for assault and battery.[7] By judicial construction this statute has been extended to cover suits for damages for assault and battery.[8]

This construction would seem to place Mississippi in the anomalous situation of having one statute with its primary purpose that of inducing the insulted person to take monetary damages rather than engage in personal conflict and another statute which justifies him in going ahead and committing an assault. We have the Court offering to pay the insulted party monetary damages if he will abstain from committing any act of force or violence, which he will probably be justified in going ahead and committing under the justifiable assault statute. This would be true in a great majority of the cases, since any insult which is of such a nature that the insulted party would probably be able to recover damages under the actionable word statute, would usually also be of such a nature that a jury would hold the insulted person justified in committing "some act of force or violence" under the justifiable assault statute.[9]

Immediately after the passage of the statute the Virginia Courts were in accord with the Mississippi Courts in interpreting this statute;[10] but after only a few years, the policies of the two states seem to have

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[6]"The aim of the statute is to prevent personal difficulties for and on account of insulting language spoken by one person of another; to prevent duels and personal difficulties and the use of force and violence." Winton v. Patterson, 152 Miss. 158, 168, 119 So. 161, 163 (1928).

In Dixie Fire Insurance Co. v. Betty, 101 Miss. 880, 883, 58 So. 705 (1912) the Court stated: "This section has no application in a suit to hold a principal liable for words spoken by an agent, unless possibly in a case where such words were spoken at the command of the principal, as to which we express no opinion. Its language, together with the fact that its first appearance in our statutes was as sec. 9 of the 'Act to Suppress Duelling,' demonstrates that its enactment was for the purpose of preventing personal difficulties, and that, consequently it applies only to persons liable to become involved in such a difficulty by reason of having referred to another in words of the character therein mentioned."

In Neely v. Paine, 126 Miss. 854, 89 So. 669 (1921) the Court followed this case and held that since it is impossible for a corporation itself to actually engage in a breach of the peace, that a corporation cannot be sued under the statute.

[7]Miss. Code Ann. (1930) § 1282.

[8]Thomas v. Carter, 148 Miss. 637, 114 So. 736 (1927); Choate v. Pierce, 126 Miss. 209, 88 So. 627 (1921).

[9]It might be argued that this holding can be justified by construing the purpose of the Actionable Word Statute in preventing the "acts of force or violence" to be that of protecting the public from any breach of the peace, without any regard for the treatment which it accords the insulted person.

[10]Moseley v. Moss, 47 Va. 534 (1850); Brooks v. Calloway, 29 Va. 480 (1841).

differed[11] and the Virginia Legislature amended its statute so as to allow the truth of the words to be pleaded as a defense to the action.[12] The Virginia Courts then began using the second interpretation—construing the statute as a subdivision of the action of libel and slander, which simply enlarged the field of words actionable *per se*.[13] Under this construction the Virginia Courts now hold the truth of the statement constitutes a defense to the action,[14] which is in accordance with the majority rule that truth is a defense in an action of slander.[15]

Under the third interpretation the intention of the statute is to protect the mental security of the insulted person from insulting remarks just as his physical security is protected by an action of assault and battery and his reputation by an action of libel and slander.

The cases indicate that the Mississippi Court is in a confused state and unable to decide whether to follow this interpretation or to interpret the statute in the light of its original purpose.[16] In the principal case

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[11]"The truth, doubtless, is that, when the amendment was made, the legislature had arrived at the conclusion that, as a means of suppressing duelling, the statute, so far at least as the civil remedy given by it was concerned, was a failure, and therefore determined to permit any plea to be filed in an action under it which is admissible in an action for slander at common law. At all events that is the effect of the amended statute." Chaffin v. Lynch, 83 Va. 106, 1 S. E. 803, 812 (1887).

[12]VA. CODE (1849) c. 176, § 44.

[13]Chaffin v. Lynch, 83 Va. 106, 1 S. E. 803 (1887), s. c. on second appeal, 84 Va. 884, 6 S. E. 474 (1888).

In Grant v. Owens, 149 Va. 906, 914, 141 S. E. 9, 860, 863 (1928) the court stated: "It is still a part of our statutory law, and the courts have necessarily given effect to it as written, which is 'simply to make a class of words actionable per se which were not so at common law.' . . . In fact, the trial of an action for insulting words is completely assimilated to the common-law action for libel or slander, and from the standpoint of the Virginia law is an action for libel or slander."

[14]Using this interpretation, the Virginia court has held in Grant v. Owens, 149 Va. 906, 915, 141 S. E. 860, 863 (1928) that: "We see no reason why the same doctrines of agency should not apply to a corporation whose agent violates the statute, as are applicable to a corporation whose agent commits a common-law tort for which the corporation would be liable under the same circumstances. . . . In other words, a corporation, as any other master, is liable in damages under the statute for insulting words uttered by its agent while engaged in the ordinary course of his employment, and in connection therewith."

[15]NEWELL, SLANDER AND LIBEL (4th ed. 1924) § 696; Harrington, *Truth as a Complete Defense in an Action of Libel* (1929) 4 NOTRE DAME LAWYER 436; Ray, *Truth: A Defense to Libel* (1931) 16 MINN. L. REV. 43.

[16]Compare the language in the following cases: In Crawford v. Melton 12 Sm. & M, 328, 331 (Miss. 1831) the Court stated: "The truth or falsity of the charge contained in those words is an important consideration for a jury in estimating the actual amount of damages done to the plaintiff." In Pate v. Trollinger, 113 Miss. 255, 262, 74 So. 131, 132 (1917) the Court stated: ". . . a question for the jury to determine whether the statements made were necessary under the circumstances, and whether or not they were made maliciously for the purpose of injuring plaintiff." In Landrum v. Ellington, 152 Miss. 569, 572, 120 So. 444, 445 (1929) the Court stated: ". . . the purpose of which is to induce citizens who are maligned and whose honor is impugned to resort to the courts of the country for redress by money judgment as a salve for wounded honor. . . . " See also the authorities cited note 6 *supra*.

Yet in McLean v. Warring, 13 So. 236 (Miss. 1893) the Court stated: "The action was not for damages, for actual injuries done, but for the speaking of the

it is evidently still clinging to the original purpose theory. However, by its language in several other cases it seems to indicate a recognition of this third theory and to be assessing damages according to it.[17] It is submitted that the Court should definitely repudiate the original interpretation, and declare the present purpose of the statute to be the protection of some legal right of the insulted person—namely, his mental security.[18]

This interpretation would fill a real need in the law. With the exception of this statute, practically no protection or comfort is furnished the victim of violent and insulting language. Just so long as the words are not heard by a third party, there seems to be no limit to the

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words which are commonly considered as insults, and lead to a breach of the peace." And in Jefferson v. Bates, 152 Miss. 128, 132, 118 So. 717, 719 (1928), the principal case, the Court stated: "The statute is intended to award damages exemplary in their nature for the speaking of words which, by their usual construction and acceptation, are insulting, and calculated to lead to a breach of the peace and no special damages are necessary to be shown."

In Winton v. Patterson, 152 Miss. 158, 168, 119 So. 161, 163 (1928) the Court stated: "The aim of the statute is to prevent personal difficulties for and on account of insulting language spoken by one person of another; to prevent duels and difficulties and the use of force and violence." Yet in the same case the Court followed this statement by "The truth or falsity of the language is not an issue involved, but the truth of the language used may be pleaded and offered in evidence only in mitigation of the damages, for, surely, if insulting language used be true, then the theory of the law is that there would not be as much damages to a person as in a case where the language uttered was false."

Thus the Mississippi Courts seem to be determining the amount of the damages according to the injury done to the insulted person, and yet they state that the basis for recovery is not injury to the insulted person, that no injury need be shown; that the purpose of the statute is to prevent the breaches of the peace—not to protect or to provide damages for any injury to the insulted person. This jumble of the two interpretations is very confusing and is hardly conductive to a consistent policy. .

[17]See note 17 *supra*.

[18]Before the amendment of its statute the Virginia court seemed to be tending toward this interpretation of its statute. In Brooks v. Calloway, 29 Va. 480, 486 (1841) the court stated: "Looking to the policy of the statute, what constitutes the gravamen of the action given by it? Clearly, it seems to me, the insult to the feelings of the offended party. The court cannot say, whether the words are or are not insulting; that depends on the place, the manner and circumstances in which they are uttered."

And in Moseley v. Moss, 47 Va. 534, 545 (1850) the court stated: "It is not designed to operate as a penal enactment for the suppression of insults, because they lead to duelling. All the penal enactments of the statute are exhausted in the direct suppression of duelling; and the civil action is given for reparation in pecuniary damages of a person aggrieved by an insult. The amount of the damages is, as in all other civil actions, to be measured by the prejudice sustained by plaintiff; 'and they are awarded without regard to the penal correction of defendant, or the reformation of his manners.' The benefit to the community from the redress of civil injuries, is merely incidental and consequential, and not the immediate purpose; when treated as public wrongs, they are preceeded against by indictment or information. It would be a wild enterprise of legislation, to attempt the suppression of duelling by civil actions for provocations, prosecuted upon principles of criminal justice."

extent to which an insulting party may go in the use of vile and abusive epithets.[19]

Even though the insults are spoken publicly, they furnish grounds for suit only when the insulted party can prove actual damages to his reputation, or show that the words come within that very restricted class of defamatory statements which are actionable *per se*.[20] This leaves the great majority of the cases where insulting and abusive language is used uncovered by our law, unless this statute is interpreted so as to cover them.

By using this interpretation the courts are not necessarily deciding the question of whether or not the truth of the statement should amount to a defense. This question would still present itself.[21] The fact that the Mississippi Courts allow the truth of the statement to be pleaded as a defense in an action of slander[22] should carry some weight in settling this problem. But the principles involved in an action under the statute are not the same as those involved in an action of slander, and this ruling in an action of slander should not control this question under the statute. In an action of slander some injury to the reputation must be shown. To effect such an injury it is necessary that the words be heard by some third person. Since this is true, the usual grounds given for holding that the truth constitutes a defense to it is the benefit which society derives from the exposure.[23] Such reasoning would not apply to an action under the statute. The injury or damage to the mental security of a person by no means depends upon a third party hearing the insulting words. However, in certain circumstances, the reasoning that the person has excluded himself from his right of action at law by his own conduct will apply just as forcefully to an action under the statute as in an action of slander.

If the Court had followed this third interpretation and then decided, as a matter of policy, that truth should not constitute a defense to the action, the decision would not be open to criticism. But as the decision now stands, with the holding based on the original purpose of the statute, it is extremely hard to justify.

Robert C. Cannada

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[19]Tierney v. Young, 17 F. (2d) 766 (1927); Atkinson v. Bibb. Mfg. Co., 50 Ga. App. 434, 178 S. E. 537 (1935); Tobias v. Sumpter Tel. Co., 166 S. C. 161, 164 S. E. 446 (1932); RESTATEMENT, TORTS (1934) § 46.

[20]Farley, Inc. v. Smith, 137 So. 103 (Miss. 1931); Farley v. Bufkin, 159 Miss. 350, 132 So. 86 (1931); Holliday v. Maryland Casualty Co., 115 Miss. 56, 75 So. 764 (1917); See Malone, *Insult in Retaliation—The Huckabee Case* (1938) 11 MISSISSIPPI LAW JOURNAL 333.

[21]It is interesting to note in this regard that the Virginia court in interpreting its statute before the amendment seemed to follow this interpretation, but also held in Brooks v. Calloway, 29 Va. 480, 488 (1841) that: "By subjecting the party to an action for the insult, without regard to the truth or falsehood of the insulting language, the insults are repressed, and the controversies from which duels most generally arose, will be of rarer occurrence."

[22]Bass v. Burnett, 119 So. 827 (Miss. 1929); Neely v. Payne, 126 Miss. 854, 89 So. 669 (1921); Jarnigan v. Fleming, 43 Miss. 710, 5 Am. Rep. 514 (1870).

[23]Ray, *Truth: A Defense to Libel* (1931) 16 MINN. L. REV. 43.

RECENT DECISIONS

Criminal Law—Larceny by Trick—Particeps Criminis

Defendants represented to the prosecuting witness, an old man, that by the use of a certain chemical process and a machine owned by them they could take a one dollar bill and a bill of a higher denomination and make two bills of the higher denomination. By such representations and the simulated production of a bill as proof of these representations they succeeded in inducing the witness to let them use $1,500, which he drew out of the bank for that purpose, as they needed some "good" money to use in the process. The prosecuting witness was to receive back his $1,500 plus $750 of genuine money for the use of it. Defendants, in the presence of the witnesses, purported to go through the process of treating the money with the chemicals and putting it into the machine to be changed, it taking some time for the change to be effected. They left the machine with the witness to guard while they "went out to lunch." After waiting about 24 hours for their return, the witness decided that he had been duped and opened the contraption to find that it was stuffed with scrap paper, and that defendants had absconded with his money. Defendants were arrested and convicted of larceny. Held: The conviction should be affirmed. *Holt v. State,* 186 Miss. 727, 191 So. 673 (1939); *Ware v. State,* 186 Miss. 533, 191 So. 678 (1939); Roberts v. State, 186 Miss. 732, 191 So. 823 (1939).[1]

The rule seems to be well established in this country that where one obtains possession of property by fraud, deceit or device, such possession in the defendant and consent on the part of the owner does not exonerate the defendant from prosecution for larceny, if at the time the defendant obtained the possession he had the secret intention of appropriating the goods to his own use.[2] Though the crime of larceny is founded upon a trespass in the taking; nevertheless, if the possession of the property be obtained by fraud or deceit, the fraud will take the place of a trespass or is equivalent thereto.[3] But if the owner of the goods parts with his property in them or the title thereto, then there is no larceny; for the title is then in the wrongdoer at the time of the taking, and one cannot be guilty of steal-

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[1]These cases all involve the same transaction; in the trial court, upon request, a severance was granted to the defendants, each being tried in a separate action.

[2]Duke v. State, 181 Miss. 704, 181 So. 518 (1939); Hanna v. State, 168 Miss. 352, 151 So. 370 (1934); Akroid v. State, 107 Miss. 51, 64 So. 936 (1914); People v. Mills Sing, 42 Cal. App. 385, 183 Pac. 865 (1919); Com. v. Barry, 124 Mass. 325 (1878); Champion v. Chicago Fire & Marine Ins. Co., 104 N. J. L. 554, 151 Atl. 794 (1928); People v. Noblett, 244 N. Y. 355, 155 N. E. 670 (1927).

[3]In People v. Edwards, 72 Cal. App. 102, 236 Pac. 944, 948 (1925), the court said: "Though the taking must be against the will of the owner or trespass to his possession, still an actual trespass or actual violence is not necessary. Fraud may take the place of force. It is well settled that a taking within the definition of larceny, occurs when a person with a preconceived design to appropriate the property to his own use, obtains possession of it by means of fraud or trickery. In such cases the fraud vitiates the transaction, and the owner is deemed to still retain a constructive possession of the property." To like effect are People v. Robinson, 107 Cal. App. 211, 290 Pac. 470 (1930); and Farmers' Loan & Trust Co. v. Southern Surety Co., 285 Mo. 621, 226 S. W. 926 (1920).

ing that which is his own.[4] It is very important that this distinction be carefully observed by the courts, for it constitutes the difference between larceny and the statutory crime of obtaining property by false pretenses.[5]

The rule, on its face, is relatively simple; and the line of demarcation is so neatly drawn in judicial phraseology that it seems to leave no doubt as to the category into which the two separate crimes of larceny by trick and false pretenses should fall in a given instance. But the courts have found its practical application to the particular facts of each case not as simple as the rule, and they have fallen into much difficulty and confusion in making the distinction in numerous cases.[6] In many instances the courts have held that the taking constituted larceny where there is but little doubt that there was a transfer of title to the object obtained by fraud;[7] and, on the other hand, they have held that there could not be a conviction of larceny in cases where there could not have been a transfer of title to the defendant, and in fact there was no intention on the part of the owner that the title pass to him.[8]

In the principal case the Court found as a matter of fact that title did not pass to the defendant, and there was no intent on the part of the complaining witness

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[4]Dukes v. State, 181 Miss. 704, 181 So. 518 (1939); Foster v. State, 123 Miss. 721, 86 So. 513 (1920); People v. Edwards, 72 Cal. App. 102, 236 Pac. 944 (1925); People v. Barnard, 327 Ill. 305, 158 N. E. 729 (1924); Hudspeth v. Com., 195 Ky. 4, 241 S. W. 71 (1922); People v. Noblett, 244 N. Y. 355, 155 N. E. 670 (1927).

[5]People v. Mills Sing, 42 Cal. App. 385, 183 Pac. 865 (1919).

[6]It was said in Note (1921) 30 YALE L. J. 613: "An investigation of the modern law of larceny gives an impression of utter confusion, a field for the courts to exercise their abilities in making fine, technical and narrow distinctions. Frequently it appears to be largely a matter of guess-work as to whether or not the offense committed is larceny, embezzlement, obtaining property by false pretenses, or some other form of statutory offense created by the legislature in a vain attempt to fill up some loop-hole in the existing laws." For a more complete discussion of the difficulty in drawing the distinction and the confusion into which the courts have fallen see Beale, *The Borderland of Larceny,* (1892) 6 HARV. L. REV. 244; Notes (1920) 20 COL. L. REV. 318, (1939) 16 N. Y. U. L. Q. REV. 487.

[7]Holding that obtaining money by fraudulent gambling schemes to be larceny: Paine v. U. S., 7 F. (2d) 273 (C. C. A. 9th, 1925); People v. Shaw, 54 Mich. 403, 24 N. W. 121, 58 Am. Rep. 372 (1885); Defrese v. State, 3 Heisk. 53, 8 Am. Rep. 1 (Tenn. 1870). It would seem, however, that the intent is to pass title to the money when it is lost in gambling schemes such as were involved in these cases, and a more correct result seems to have been reached in State v. Anglin, 222 S. W. 776 (Mo. 1920), where it was held not to be larceny; but it must be admitted that the former view is in the large majority. In Loomis v. People, 67 N. Y. 322, 23 Am. Rep. 123 (1876) the defendant was held to be guilty of larceny when he obtained money from the complaining witness to be bet by the defendant, the defendant to repay if he lost as soon as he could get a check cashed, which he purported to have in his possession. Here it would seem clear that title to the money was to pass, but the Court said that it was delivered only for a specific purpose and title remained in the witness. It is submitted that this decision is erroneous. See also Queen v. Russett, [1892] 2 Q. B. 312 for a holding of larceny where title was to pass.

[8]There are certain instances in which the courts have almost uniformly held that the defrauder is guilty of obtaining goods by false pretenses though the title could not possibly pass to the defendant. The common case is that of personation. People v. Johnson, 12 Johns. 292 (N. Y. 1815) (pretending to get goods for another); Com. v. Jefferies, 7 Allen 548 (Mass. 1863) (representing to be acting for undisclosed principal); Coleman's Case, 2 East P. C. 672 (borrowing money for pretended mistress); Rex v. Adams, Russ. & Ry. 225 (1812) (sending small boy for goods of third person).

that it should. As the Court said "He did not part with the title to or legal possession of his money. He intended that they, and they promised to, use the money in his presence, and they were to return to him his identical $1,500. It was to be used only for the specific purpose which they outlined to him, and convinced him could happen."[9] Under this express finding as to the facts, there can be no doubt but that the decision is correct.

But in the absence of an expressed or implied agreement on the part of the complaining witness and the defendants that the identical money was to be returned, the understanding being merely that he was to get back $1,500, the amount given them by him, and $750 as a bonus, then the problem of the Court would have been much more difficult than in the principal case. In such a case it would be only logical to presume that the witness was not interested in the exact bills to be received back but that he only wanted to get the aggregate sum of $2,250. The debt could be satisfied with that amount of bills, regardless of their identity. The sum might then include any part of the new bills manufactured by the process. In such case it would seem that the witness intended to relinquish all his title and property right in the bills to the defendants in consideration for the promise to return the agreed amount of money at the completion of the process of raising the bills. It is clear that one has as much property right in money as in any other goods, and there seems to be little reason for making any distinction between the cases where the owner parts with his money with the intention of accepting other money in lieu thereof, and the one where the owner of any other goods transfers them to another for other goods.[10] In both cases it would seem that the title to the particular thing transferred, whether it be money or other goods, is divested out of the transferor and vested in the transferee. The property is within the particular piece of money, and if it is transferred to another with no intention of receiving the identical piece back, but with the intention of receiving something in its stead, then the transferor must have intended to part with his property in the money though he may have been induced to do so by fraud.[11] Therefore it would appear that in

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[9]Ware v. State, 186 Miss. 533, 538, 191 So. 678, 680 (1939). Where the possession is obtained by defendant on a false representation that the property is to be used for a special purpose, the title remains in the transferor. People v. Robinson, 107 Cal. App. 211, 290 Pac. 470 (1930); Elliot v. Com. 75 Ky. 176 (1876); Loomis v. People, 67 N. Y. 322, 23 Am. Rep. 123 (1875).

[10]But this distinction seems to have been drawn in People v. Miller, 169 N. Y. 339, 62 N. E. 418, 422, 88 Am. St. Rep. 546, 556 (1902), the Court saying: ". . . the thing delivered to the defendant was money, which has no earmark. It lost its identity when delivered to the defendant, and the complainant of course could not have intended that the identical bills which were delivered to the defendant should be returned to her. The difference . . . is founded entirely upon the different character of the property which the accused obtained."

[11]In State v. Germain, 54 Ore. 395, 103 Pac. 521 (1909), it was held to be false pretenses where defendant obtained money from the prosecutor upon the false representation that he could give him information which would enable him to obtain a job, promising to refund the money if the prosecutor did not get the job. Defendant protested that the title did not pass, as it was to be refunded if the job was not obtained, but the Court said ". . . there is nothing in the instrument itself that indicates that defendant was to return the identical money. . . ." 103 Pac. at 523. But *cf.* People v. Miller, *supra* note 10. The supposed case is to distinguished from those cases where property is delivered for a temporary and specific purpose, for in most of them the particular *res* itself was to be returned; but here the particular bills were not to be returned. It is also not to be confused with those

strict logic the hypothetical case under consideration is not larceny but that of obtaining property by false pretenses. However, it is quite possible that a number of courts would hold otherwise.[12]

The principal case is also important from another viewpoint—that of *particeps criminis*—for here it is plain that the prosecuting witness was himself actively engaged in an unlawful transaction. While the majority rule is otherwise,[13] there are at least three jurisdictions which have held that such conduct on the part of the prosecuting witness would be a complete defense to a criminal action brought against the perpetrator of the fraud. These jurisdictions are New York[14] and Wisconsin,[15] which early adopted the rule, and Oregon,[16] which as late as 1915 gave it judicial sanction. The effect of such a rule upon those individuals who are quick to seize upon the slightest possibility of protection for their evil deeds might very readily be visualized.[17] It is significant that the rule was subsequently changed in New York by statute[18] and in Oregon by a subsequent judicial decision.[19]

The doctrine laid down by these courts seems to have been based upon a legal misconception from the first—that "neither the law nor public policy designs the protection of rogues in their dealings with each other, in their dishonest practices."[20] For in a criminal proceeding the State is the prosecutor, and the proceeding is in its name, the prosecuting witness being no party to the action. The prosecution is not for the benefit of the complaining party; but its purpose is to punish a public offense and prevent wrongdoing. Crime is against society and is punished for its

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cases holding it to be larceny where the defendants were given money to be changed or in payment of goods in which change was expected; for in those instances the delivery of the money to the defendant and the change to be given by him were to be simultaneous acts, while in the supposed case the $2,250 was not to be given to the witness until after the process of making the payment had been completed, the defendants being debtors to him for that amount during that time.

[12]Compare the authorities cited *supra* notes 7 and 10.

[13]Lawson v. State, 120 Ark. 337, 179 S. W. 818 (1915); Commins v. People, 16 Colo. 451, 27 Pac. 887, 25 Am. St. Rep. 291, 13 L. R. A. 752 (1891); State v. Wolf, 168 Minn. 505, 210 N. W. 589 (1926); State v. Foster, 38 N. M. 540, 37 P. (2d) 541, 95 A. L. R. 1247 (1934); State v. Mellenburger, 95 P. (2d) 709 (Ore. 1939); State v. Posey, 88 S. C. 313, 70 S. E. 612 (1911).

[14]People v. Tompkins, 186 N. Y. 413, 79 N. E. 326 (1906); McCord v. People, 46 N. Y. 740 (1871); People v. Stetson, 4 Barb. 151 (N. Y. 1848).

[15]State v. Crowley, 41 Wis. 271 (1876).

[16]State v. Alexander, 76 Ore. 329, 148 Pac. 1136 (1915).

[17]The effect of such decision in the State of New York was very dramatically pointed out in Train, *The Last of the Wire-Tappers*, in True Stories of Crime (1908) 103, 117: "The 'wire-tappers,' the 'gold-brick,' and the 'green-goods,' men flocked to New York, which under the unwitting protection of the Court of Appeals, became a veritable Mecca for persons of their ilk . . . Had not the Court of Appeals recognized their profession? . . . They walked the streets flaunting their immunity in the very face of the police . . . One crook bred another every time he made a victim . . . Broadway was thronged by a prosperous gentry, the aristocracy and elite of knavery, who dressed resplendently, flourished like the green bay-tree and spent their (or rather their victims') money with the lavish hand of one of Dumas's gentlemen . . . The McCord case stood out like a cabalistic sign upon the gate-post telling all the rascals who passed that way that the city was full of honest folk waiting to be turned to rogues and 'trimmed.'"

[18]N. Y. Penal Law § 1290.

[19]State v. Mellenburger, 95 P. (2d) 709 (Ore. 1939).

[20]McCord v. People, 46 N. Y. 470, 472 (1871).

protection and for the vendication of the law, rather than to redress the wrongs of its victims.[21] The rule as laid down by these three jurisdictions has found rather general recognition in civil cases for reimbursement or contribution between rogues and wrongdoers; and a majority of those courts repudiating it as applied to the criminal proceedings in the same opinion have recognized its utility in civil actions.[22] But even in the civil cases there is a growing tendency on the part of the more modern courts to set aside this doctrine where the parties are *in delicto,* but not *in pari delicto,* if the wrong of the defendant is so much greater than that of the victim, as to make him comparatively free of guilt.[23] Even in cases where the parties are *in pari delicto* the court may in its discretion interfere and grant relief at the suit of one of them, where public policy requires an intervention; for the guilt of the parties is not considered as equal to the higher right of the public.[24]

The social policy of Mississippi seems to have been so definitely established that the Court in the instant case did not even raise the question of *particeps criminis.* Clearly the Court is following the majority view, and there is no reason to fear that it will even be inclined to adopt the unfortunate view of the *McCord* case.[25]

Clifford L. Leggett

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[21]People v. Noblett, 244 N. Y. 355, 155 N. E. 670 (1927); Horton v. State, 85 Ohio St. 13, 96 N. E. 797, 36 L. R. A. (N.S.) 423, Am. Cas. 1913B 90 (1911); State v. Mellenburger, 95 P. (2d) 709 (Ore. 1939).

[22]Lawson v. State, 120 Ark. 337, 179 S. W. 818 (1915); People v. Noblett, 244 N. Y. 355, 155 N. E. 670 (1927); State v. Posey, 88 S. C. 313, 70 S. E. 612 (1911). For direct holding that plaintiff cannot recover the money lost in a civil suit brought for that purpose see Abbe v. Marr, 14 Cal. 210 (1859); Babcock v. Thompson, 3 Pick. 446, 15 Am. Dec. 235 (Mass. 1826).

[23]In Hobbs v. Boatright, 195 Mo. 693, 93 S. W. 934, 5 L. R. A. (N.S.) 906, 113 Am. St. Rep. 709 (1906) it was said: "Where the parties to the transaction, although concurring in the illegal act, are regarded as not equally guilty, in consequence of fraud, oppression, imposition, or hardship practiced by one party on the other, thereby obtaining unconscionable advantage, under such circumstances courts of equity have not hesitated to interfere in behalf of the less guilty party and against the chief mover in an unlawful enterprise." Of like tenor are Stewart v. Wright, 147 Fed. 321 (C. C. A. 8th, 1906), and Lockman v. Cobb, 77 Ark. 279, 91 S. W. 546 (1905). All these cases involved the notorious "Buckfoot Gang," which was operating over several states and had aroused quite a bit of sentiment on the part of the public; their activities had grown so vicious as to defy action on the part of the public officers.

[24]Hobbs v. Boatright, 195 Mo. 693, 93 S. W. 934, 5 L. R. A. (N.S.) 906, 113 Am. St. Rep. 709 (1906); Stewart v. Wright, 147 Fed. 321 (C. C. A. 8th, 1906).

[25]Judge Ethridge very tersely summed up the general attitude of the court in the conclusion of his opinion in the *Holt* case by saying: "This is another verification of the adage 'that crime does not pay,' and it also reflects the admonition that the lure of easy money should not induce one to participate in the commission of crime. The appellant received five years at hard labor for his share in the transaction, and the prosecuting witness lost $1,500 for his participation and gullibility." 186 Miss. at 731, 191 So. at 674.

TRUSTS—TRUSTS ARISING FROM OPERATION OF LAW—STATUTE OF FRAUDS—CONSTRUCTIVE AND RESULTING TRUSTS—PURCHASE-MONEY RESULTING TRUSTS—TRUSTS ARISING FROM ORAL PROMISE TO RECONVEY

White was in possession as tenant of certain lands which he desired to purchase. Not having the necessary funds, he asked Tanous, a moneylender, to purchase the lands for him. Tanous agreed to do so on condition that the title should be conveyed to him to be held in trust during the time of the repayment of the purchase price by White. Accordingly, Tanous paid the purchase price to the vendor and had the vendor to convey title to him. The deed contained no recital that the property was conveyed in trust to be treated as security for the purchase money, and there was no other writing evidencing the transaction. Upon being tendered the amount due him, Tanous refused to convey as promised. HELD: White was entitled to a conveyance upon payment of the purchase price and the accrued interest thereon. *Tanous v. White,* 186 Miss. 556, 191 So. 278 (1939).

Certain land owned by Williams was sold to the State for taxes due thereon, and the period of redemption expired. Williams, with the intention of repurchasing the property from the State, made application to the land commissioner for the land, and a patent was issued to him. He had no money with which to pay for the land, and Lewis, his brother-in-law, Edna Washington, his niece, and Leander Washington, Edna's husband, furnished the money with which the land was purchased. While there is some doubt, it appears that the purchase money was not paid as a loan to Williams. It was decided that the patent would be allowed to stand in Williams' name and that he would execute a quit-claim deed to Lewis. Before the quit-claim deed was executed, it was orally agreed that the land would be deeded back to Williams if he repaid the money given for the patent. Lewis went into possession of the land by mandate of an unlawful entry and detainer court. Williams later tendered the money and asked for a reconveyance. HELD: The oral agreement was not enforceable and Williams could not compel a reconveyance. *Lewis v. Williams,* 186 Miss 701, 191 So. 479 (1939).

The Mississippi Statute of Frauds requires a writing either where there is a contract for the sale of land or where there is a declaration or a creation of a trust in land.[1] The Statute further stipulates, however, that these provisions are intended to have no effect on trusts of land that arise or result by implication of law.[2]

The classes of trusts which are considered as arising or resulting by implication of law are (1) resulting trusts and (2) constructive trusts. A resulting trust arises where a person makes or causes to be made a disposition of property under circumstances which raise an inference that he does not intend that the person taking or holding the property should have the beneficial interest therein.[3] A constructive trust is imposed where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it.[4]

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[1]MISS. CODE ANN. (1930) §§ 3343, 3348.
[2]MISS. CODE ANN. (1930) § 3348.
[3]3 SCOTT, TRUSTS (1939) § 404.1; 2 RESTATEMENT, TRUSTS (1935) § 404.
[4]3 SCOTT, TRUSTS § 462; 2 RESTATEMENT, TRUSTS § 440. See Comment (1940) 12 MISSISSIPPI LAW JOURNAL 380.

One of the situations in which the resulting trust arises is where the purchase price for property is paid by one person and the property is conveyed to another. An inference arises from the character of the transaction that the person taking title to the property is not entitled to have the beneficial interest therein. No promise, written or oral, need be shown, the inference attributed by law to the transaction constituting the basis of the trust.[5] The fact that the transferee pays the purchase price as a loan and that the money was never in the hands of the other person does not alter the case. The inference still results, it being considered that it is the other person's money which is paid for the land, he becoming indebted to the transferee for the amount of the purchase price.[6]

These principles have been repeatedly recognized by decisions of the Mississippi Court,[7] and they were correctly applied in the principal case of *Tanous v. White*. In the other case of *Lewis v. Williams,* the money paid for the purchase price appears, in fact, not to have been loaned to Lewis. This being the case, there would be no possibility of a resulting trust being established in Lewis's behalf. But the Court intimated that even if the effect of the transaction had been that Lewis borrowed the money and gave the quitclaim deed solely as security therefor, he still would not have been in a position to compel a reconveyance.

Thus, if one borrowing the purchase price for land secures the loan by having the vendor of the land transfer the absolute title directly to the moneylender, the moneylender holds the land as a resulting trustee. But if the borrower first takes title in his own name and then for the purpose of securing the loan makes an absolute deed to the moneylender, there is no resulting trust. The reason for the difference in result is that in the former instance the character of the transaction

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[5]2 BOGERT, TRUSTS AND TRUSTEES (1935) § 454; 3 SCOTT, TRUSTS § 404.1. This inference may be overcome by evidence showing that the transferee was in fact entitled to have the beneficial interest. See Capers v. McCaa, 41 Miss. 479 (1867); Mahorner v. Harrison, 21 Miss. 53 (1849). In the *Capers* case, the Court said: "The ground on which the doctrine of resulting trust rests with reference to property purchased with the money or means of one person and conveyed to another person, is the presumption of law that the party whose money is applied to the payment for the property *intended it for his own benefit,* and that the nominal purchaser is a mere trustee. Adam's Equity, 33. But this presumption is liable to be rebutted either by positive or negative proof, or by the declaration of the parties contemporaneous with the transaction of purchase, or by other direct proof of intention, or by the circumstances attending the transaction showing that such was not the intention of the parties at the time." 41 Miss. at 487. And, where the transferee is in such a relation to the donor as to be a natural object of his bounty, it is presumed that an advancement was intended. See Gee v. Gee, 32 Miss. 190 (1856).

[6]2 BOGERT, TRUSTS AND TRUSTEES § 455; SCOTT, TRUSTS § 448; 2 RESTATEMENT, TRUSTS § 448.

[7]In Thomas v. Thomas, 62 Miss. 531, 534 (1885), the Court said: "To the existence of a resulting trust it is necessary that in the transaction of purchase the money or credit of the beneficiary should be used, but a constructive payment by him is equally efficacious as one made by him in person. Thus if the person who actually makes the payment of the money does so under an agreement to lend the amount to the other and pays it as the money of that other, taking title in himself as security for the money loaned, a trust arises in favor of the borrower." See also Wilson v. Hoffman, 104 Miss. 743, 61 So. 699 (1913); Robinson v. Leflore, 59 Miss. 148 (1881); Harvey v. Ledbetter, 48 Miss. 95 (1873); Jones v. McDougal, 32 Miss. 179 (1856).

by which the deed was given to the moneylender creates the presumption that he was not to have the beneficial interest in the property, while in the latter instance, there is no such presumption. Since this presumption is the basis of the resulting trust, such a trust does not arise in the latter transaction.

In neither case did the transferee pay anything for the land. Therefore, it would seem that there is no logical reason for attributing the presumption to one transaction and not attributing it to the other. At one time, the English courts appear to have generally considered that a gratuitous conveyance did give rise to such a presumption and that a trust therefore resulted to the transferor.[8] However, the American courts have refused to adopt this view, although most of them have accepted the "purchase-money" resulting trust doctrine.[9] This seeming inconsistency has been attributed to the fact that the presumption in the case of the purchase money transaction is more natural than the one in the case of a gratuitous conveyance and that such a presumption in the latter case would usually be contrary to fact.[10]

Even though it be true that in the ordinary gratuitous conveyance a presumption that the transferee was not to take the beneficial interest would be contrary to fact, it seems that where there is the attendant circumstance that the transferor was indebted to the transferee *for the purchase price of the property conveyed,* such a presumption would be entirely reasonable. And, although the American courts generally do not consider that a resulting trust arises in such a situation, relief is sometimes given the transferor on the ground that an absolute deed can in equity be proved to have been intended as a mortgage.[11] The basis for equitable relief is usually said to be the inequitable conduct of the transferee and his consequent unjust enrichment.[12]

The Mississippi Court at one time gave relief in such a situation.[13] At the present time, however, it is provided by statute that parol evidence is not admissible to show that a deed absolute on its face was intended to be a mortgage, unless

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[8]Tyrell's Case, 1 Freeman 304 (1674); Elliot v. Elliot, 2 Ch. Cas. 231 (1677). See Costigan, *The Classification of Trusts as Express, Resulting, and Constructive* (1914) 27 HARV. L. REV. 437, 441; Stone, *Resulting Trusts and the Statute of Frauds* (1906) 6 COL. L. REV. 326, 328.

[9]"The doctrines as to raising a resulting use upon a gratuitous conveyance have not been applied to modern trusts. There are no modern cases in which it has been held that where a gratuitous conveyance is made without a declaration of trust, a resulting trust arises in favor of the transferor." 3 SCOTT, TRUSTS § 405. At the present time in England, the Law of Property Act of 1925, 15 Geo. v., c. 20, § 60 (3), specifically provides: "In a voluntary conveyance, a resulting trust for the grantor shall not be implied merely by reason that the property is not expressed to be conveyed for the use or benefit of the grantee."

[10]See Costigan, *The Classification of Trusts as Express, Resulting, and Constructive* (1914) 27 HARV. L. REV. 437, 443.

[11]Kirby v. Field, 183 Ark. 714, 38 S. W. (2d) 308 (1931); Cardozo v. White, 219 Cal. 474, 27 P. (2d) 639 (1935); Hannig v. Conger, 54 Nev. 388, 19 P. (2d) 769 (1933).

[12]It seems clear that the unjust enrichment in a case of an oral mortgage would be no greater than the unjust enrichment in the case of an oral trust. Scott suggests that the courts have been influenced by the fact that the "economic necessities of the transferor may lead him to assent to an oral mortgage where there would be no similar reason for his assent to an oral trust." 1 SCOTT, TRUSTS § 44.3.

[13]Littleworth v. Davis, 50 Miss. 403 (1874); Vasser v. Vasser, 23 Miss. 378 (1812).

the mortgagor remained in possession or unless the mortgagee procured the conveyance by fraud.[14] The statute evidently does not apply in cases similar to *Tanous v. White* where a recovery is allowed on the independent ground of a purchase-money trust and without reliance on the rule that a deed absolute may be shown to be a mortgage.[15] It should apply only where the relief being sought is dependent alone upon the rule that equity will construe a deed as a mortgage when it was given for the purpose of security. If this rule is the sole ground for relief in the situation where a borrower of the purchase money for land gives the moneylender title to that land as security, the statute must apply in that situation. If the statute does apply, there is an anomalous result. A person borrowing money with which to buy land and securing the loan by having the vendor convey directly to the money-lender by absolute deed need prove no possession or fraud in order to require a conveyance; yet, if he has the vendor make the deed to him, and he in turn makes an absolute deed to the money-lender, he must prove either possession or fraud.[16] It is suggested that this result is illogical and unnecessary. A different holding could be justified, either on the ground that the transaction in effect amounted to the purchase-money resulting trust situation, or on the ground that in the circumstances a different type of resulting trust arose—one that was based on a presumption from the circumstances that the transferee was not entitled to take the beneficial interest and that was, therefore, not within the scope of the intent of the statute.[17]

There are other possible grounds for recovery in a case of this kind, but it is doubtful if the facts in *Lewis v. Williams* warranted the application of any of them. It is usually held that an oral promise by the grantee of land to reconvey to the grantor at a later date, is unenforceable.[18] Many courts enforce such a promise,

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[14]Miss. Code Ann. (1930) § 3351.

[15]This is probably true although recovery results in treating an absolute deed as a mortgage. In *Tanous v. White,* the Court placed some emphasis on the fact that White remained in possession of the land, but the general tenor of the decision indicates that the holding would have been the same had White not been in possession. Compare, however, the view expressed in Dulaney and Bell, *Work of the Mississippi Supreme Court—Property* (1940) 13 Mississippi Law Journal 60.

[16]These situations have already been compared, but the materiality of the difference in their legal effect becomes more obvious after a consideration of the statute.

[17]In *Lewis v. Williams,* the quitclaim deed stated a consideration of one dollar "and other considerations." This fact could be considered as additional reason for a holding that there was no presumption that the transferee was not to take the beneficial interest. However, it is well settled that in the purchase-money resulting trust situation, it makes no difference that the deed states a consideration paid by the grantee or that the conveyance is expressly declared to be to the use of the grantee. 3 Scott, Trusts § 405. There seems to be no reason why the rule in regard to the two transactions should be different.

[18]Brock v. Brock, 90 Ala. 86, 8 So. 11 (1889); McRae v. McRae, 37 Ariz. 307, 294 Pac. 280 (1930); Brown v. Carmichael, 152 Ga. 353, 110 S. E. 3 (1921). The weight of authority in the United States sustains this view, although the English Courts hold otherwise. The Mississippi Court has adopted the American view. In Ragsdale v. Ragsdale, 68 Miss. 92, 98, 8 So. 315, 316 (1890), the Court said: "There must be conduct influential in producing the result and but for which such result would not have occurred . . . to save the case from the statute of frauds. A merely oral promise, and its subsequent breach, however disappointing and harmful and though ever so reprehensible in morals, is not of itself enough to cause a court of Chancery to declare a trust." See also Wax v. Pope, 175 Miss. 784, 168 So. 54 (1936); Moore v. Crump, 84 Miss. 612, 37 So. 109 (1904).

however, (1) where the transfer was obtained by fraud, duress, or undue influence;[19] and (2) where the transferee was in a confidential or fiduciary relation to the transferor.[20] The basis for the holding in each of these circumstances is that the transferee refusing to perform is a constructive trustee.

In *Lewis v. Williams,* no undue influence or duress was alleged, and it appears that the only fraud was the refusal of the transferee to reconvey as promised. The Mississippi Court does not consider this sufficient fraud to charge the transferee as constructive trustee.[21] However, if the transferee intended not to fulfill his promise at the time the conveyance was made, there is sufficient fraud to enable the transferor to enforce a constructive trust.[22]

When the transferee is in a confidential relation to the transferor, some courts hold him chargeable as constructive trustee, even though he intended to perform as promised when the conveyance was made.[23] Some of the courts so holding do not require that there be a fiduciary relation, such as that between principal and agent, attorney and client, or trustee and cestui que trust; but consider it sufficient if there is a family or other personal relationship of such a character that the transferor is justified in believing that the transferee will act in his interest.[24] The Mississippi Court, while it has indicated that it will enforce a reconveyance on the ground that there was a fiduciary relationship,[25] has been reluctant to do so where there was only a family or other personal relationship.[26] It is therefore improbable that Lewis would

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[19]Ford v. Ford, 44 Cal. App. 415, 186 Pac. 164 (1919); Brown v. Dean, 86 Ga. 32, 12 S. E. 179, 11 L. R. A. 381 (1890); Terrell v. Appleton, 274 Mass. 393, 174 N. E. 682 (1931); Notes (1925) 35 A. L. R. 280, 287, (1932) 80 A. L. R. 195, 199.

[20]Harrington v. Schiller, 231 N. Y. 278, 132 N. E. 89 (1921); Bryant v. Mahan, 130 Okla. 67, 264 Pac. 811 (1927); Cardiff v. Marquis, 17 N. D. 110, 114 N. W. 1088 (1908); Notes (1925) 35 A. L. R. 280, 310, (1926) 45 A. L. R. 851, 854 (1926); (1932) 80 A. L. R. 195, 204.

[21]See note 18 *supra.*

[22]See Wax v. Pope, 175 Miss. 784, 168 So. 54 (1936); Moore v. Crump, 84 Miss. 612, 37 So. 109 (1904). In *Lewis v. Williams,* there was evidence that Williams demanded that the contract be executed the day he gave the quitclaim deed; and that Lewis refused to do so, but renewed the oral promise. This fact could have been considered as indicating a fraudulent intent at the time of the conveyance. There is also the possibility that this action on the part of the grantee in the quitclaim deed could have been held to entitle Williams to relief by reformation of that deed. In Meacham Contracting Co. v. City of Hopkinsville, 164 Ky. 703, 176 S. W. 187, 189 (1915), the court said: ". . . if a party objects to a writing on the ground that a stipulation is omitted or a condition is inserted that should not be, or because it does not conform to the agreement, and the other party assures him that the matter in controversy will be arranged to carry out their prior and present understanding of the contract, the complaining party will be entitled to relief." See also Coger v. McGee, 2 Bibb. 321, 5 Am. Dec. 610 (Ky. 1811).

[23]See note 20 *supra.*

[24]Sinclair v. Purdy, 235 N. Y. 225, 139 N. E. 89 (1923) (brother to sister); Trimble v. Boles, 169 Okla. 228, 36 P. (2d) 861 (1934) (sister-in-law to brother-in-law); McGann v. McGann, 169 Okla. 515, 37 P. (2d) 939, 101 A. L. R. 748 (1934) (mother to son).

[25]See O'Conner v. Ward, 60 Miss. 1025 (1883).

[26]See Clearman v. Cotton, 66 Miss. 467, 6 So. 156 (1889); Moore v. Jordan, 65 Miss. 229, 3 So. 737 (1888). The Court has not definitely stated that it will not allow relief on this ground, however, and Horne v. Higgins, 76 Miss. 813, 25 So. 489 (1899) and certain dicta in Moore v. Jordan, 65 Miss. 229, 3 So. 737 (1888) might be interpreted as indicating that in the proper circumstances,

have been able to charge the transferees as constructive trustees on the ground that their relationship to him invited his confidence.

Another situation in which some courts have declared a constructive trust to exist is where land was about to be sold at an involuntary sale for non-payment of taxes or on foreclosure of a mortgage or on execution of a judgment, and the owner refrained from preventing the sale or otherwise protecting his interest at the sale because of the oral promise of the purchaser to buy in the land and reconvey to the former owner on his paying the amount expended.[27] The Mississippi Court at one time definitely pronounced such a rule;[28] and, though there is some indication that it has wavered therefrom,[29] it is entirely probable that the rule will be applied in the proper situation. In the instant case, however, Lewis had no interest to protect, and under such circumstances the rule is not applicable.

Stanny Sanders.

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the Court will allow relief on the ground that there was a family or close personal relationship. See also Palmer v. Spencer, 161 Miss. 563, 137 So. 491 (1931) where the Court placed some emphasis on the fact that "no fiduciary or confidential relation was shown to exist."

[27]Moore v. De Bernardi, 47 Nev. 33, 213 Pac. 1041 (1923); Prescott v. Jenness, 77 N. H. 84, 88 Atl. 218 (1913); Ryan v. Dox, 34 N. Y. 307, 90 Am. Dec. 696 (1866); Rush v. McPherson, 176 N. C. 562, 97 S. E. 613 (1918).

[28]In Soggins v. Heard, 31 Miss. 426, 427 (1856), the Court stated: "It is not now an open question that when a party agrees before the sale to purchase property about to be sold under an execution against a party, and to give such party the benefit of the purchase that the agreement is binding and will be enforced. The defendant, upon the faith of such an agreement, may have ceased his efforts to raise the money for the purpose of paying off the execution and thus preventing a sale of his property. It will not do to say that the party promising was moved merely by friendly or benevolent considerations and may, therefore, at this option, decline a compliance with this agreement."

[29]In Campbell v. Bright, 87 Miss. 443, 40 So. 3 (1905) and Miazza v. Yerger, 53 Miss. 135 (1876), the facts seemed to justify an application of this rule. The Court, however, evidently did not consider it in deciding the cases.

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